85-1617

No.

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

EMERSON ELECTRIC CO.,
Petitioner,

v.

JANET SWENSON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

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April 1986

QUESTION PRESENTED

Whether the Minnesota Supreme Court erred in permitting plaintiffs to maintain a private damage action under the Consumer Product Safety Act based on nonbinding regulations issued by the Consumer Product Safety Commission to interpret the reporting requirements of Section 15(b) of the Act, when there is no private right of action to enforce these requirements and the Commission is not authorized to issue any binding rules under that section.

LIST OF PARTIES

The parties to the proceeding in the Minnesota Supreme Court, other than those in the caption, were the A. O. Smith Corporation and Lake Region Cooperative.

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JANET SWENSON,
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

Emerson Electric Co. petitions for a writ of certiorari to review the decision of the Minnesota Supreme Court holding that Section 23 of the Consumer Product Safety Act ("CPSA") permits private litigants to recover damages for conduct contrary to nonbinding interpretive regulations issued by the U.S. Consumer Product Safety Commission ("CPSC").

OPINIONS BELOW

The opinion of the Minnesota Supreme Court, reported at 374 N.W.2d 690 (1985), appears at Appendix A to this petition. The opinion of the Minnesota Court of Appeals is reported at 356 N.W.2d 313 and appears at Appendix B. The decision of the District Court for the Seventh Judicial District is unreported and appears at Appendix C.

JURISDICTION

The decision of the Minnesota Supreme Court which is the basis for this petition was issued on September 20, 1985. Emerson's timely petition for rehearing was denied on December 13, 1985. The judgment, entered on January 2, 1986, appears at Appendix D. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

STATUTES AND REGULATIONS INVOLVED

Sections 15(b) and 23(a) of the CPSA, 15 U.S.C. §§ 2064(b) and 2702(a), are reprinted in Appendix E. The CPSC regulations involved, 16 C.F.R. Part 1115, were published at 43 Fed. Reg. 34,988 (Aug. 7, 1978) and are reproduced in pertinent part in Appendix F.

STATEMENT OF THE CASE

Statutory Background

The CPSA was enacted in 1972 to protect consumers against unreasonable risks of injury associated with consumer products. *See* 15 U.S.C. § 2051. The CPSA grants the CPSC, the implementing agency, authority to issue a variety of rules and orders to achieve this statutory goal. For example, the Commission can promulgate rules banning unsafe products or requiring manufacturers to observe performance or labeling requirements intended to minimize potential risks. *Id.* §§ 2055, 2056. Similarly, it can issue orders requiring manufacturers to take corrective actions if a product is found to present a substantial product hazard. *Id.* § 2064(c),(d). These rules and orders are designed to implement statutory provisions that authorize agency action but do not themselves place duties on manufacturers.

However, the CPSA also contains some provisions which impose obligations directly upon manufacturers without any further administrative action. One such requirement is the

reporting obligation prescribed by Section 15(b), which provides that a manufacturer of a consumer product "who obtains information which reasonably supports the conclusion that such product . . . contains a defect which could create a substantial product hazard . . . shall immediately inform the Commission . . . of such defect." 15 U.S.C. § 2064(b).

The Act contains provisions for enforcement both by the Commission and by private damage actions, but the scope of the private remedy is significantly narrower. The Commission may act to remedy a violation either of a CPSC rule or order implementing a general statutory goal or a violation of a direct statutory obligation such as the Section 15(b) reporting requirement; in either case, the Commission may bring an action to impose civil or criminal penalties, to obtain an injunction, or to seize the product. 15 U.S.C. §§ 2069-2071. In contrast, Section 23(a) authorizes private citizens to sue for damages only for a "violation of a consumer product safety rule, or any other rule or order issued by the Commission . . . ." *Id.* § 2072.[1] Private enforcement is thus limited to violations of rules or orders, while enforcement of direct statutory requirements, like Section 15(b), is a function assigned solely to the Commission itself.

Proceedings Below

This case is a wrongful death action filed in 1981 in the District Court for the Seventh District in Minnesota. The case

[1] The term "consumer product safety rules" covers standards and bans issued under Sections 7 and 8 of the Act, 15 U.S.C. §§ 2056, 2057. Additional rulemaking authority is contained in other provisions of the Act. The Commission is authorized, for example, to regulate stockpiling of products to which a consumer product safety rule applies (§ 9(g)), 15 U.S.C. § 2058(g); to prescribe testing programs for certain consumer products (§ 14(b)), 15 U.S.C. § 2063(b); to prescribe certain kinds of labeling requirements (§ 14(c)), 15 U.S.C. § 2063(c); to require certain kinds of recordkeeping by manufacturers (§ 16(b)), 15 U.S.C. § 2065(b); to require submission of performance and technical data (§ 27), 15 U.S.C. § 2076(e); and to issue certain rules specifically applicable to cellulose insulation (§ 35), 15 U.S.C. § 2082. Rules issued under these provisions would be substantive in nature, and thus would be covered by Section 23, either as "consumer product safety rules" (the rules issued under Section 7 or 8, 15 U.S.C. §§ 2056, 2057) or as "other rules."

grows out of a liquid propane gas explosion caused by alleged defects in a water heater thermostat manufactured by Emerson Electric Co. Mrs. Swenson, the plaintiff below, originally asserted claims sounding in negligence, breach of warranty, and strict liability. In 1983, however, she sought to amend her complaint to add a cause of action under Section 23 of the CPSA. In her amended complaint, Mrs. Swenson alleges that Emerson is liable for damages under Section 23 on the theory that it violated Section 15(b) of the Act by failing to inform the CPSC in timely fashion of certain defects in its water heater thermostats.

In proceedings before the District Court, Emerson opposed Mrs. Swenson's proposed amended complaint on the ground that Section 23 of the CPSA does not authorize private suits for violations of statutory provisions like Section 15(b). The trial judge rejected Emerson's argument and allowed the amended complaint but certified the questions raised to the Minnesota Court of Appeals. On October 2, 1984, that court issued its opinion upholding the decision of the District Court. Emerson then petitioned for review by the Minnesota Supreme Court.

In affirming the Court of Appeals decision, the Minnesota Supreme Court recognized that Section 23 "does not have language allowing a private cause of action for violation of the statute, but only for violation of rules promulgated under the statute." (App. 17a) The court held, however, that private litigants can bring suit for alleged reporting violations under Section 15(b) by invoking certain regulations promulgated by the Commission as guidelines to assist manufacturers in interpreting Section 15(b). According to the court, these regulations should be considered "rules" for purposes of Section 23 (App. 14a-15a). The court acknowledged that the CPSC's reporting guidelines "are properly characterized as interpretive rules." (App. 11a-12a n.2) However, the court found that "interpretive rules can be binding" where they are held valid by the courts (App. 18a). It then proceeded to hold the reporting guidelines valid, and concluded they could therefore provide the basis for private recovery under Section 23.

REASONS FOR GRANTING THE WRIT

By permitting private litigants to seek damages for alleged nonreporting under Section 15(b), the decision below disregards Congress' clear intent to limit private suits under Section 23 to "violations" of "rules or orders." The CPSA contains a detailed scheme for enforcing statutory requirements like Section 15(b), but this scheme does not include damage suits by private litigants. The lower court's rationale for creating such a remedy—that the CPSC's regulations under Section 15(b) constitute "rules" which can be "violated" for purposes of Section 23—conflicts with an unbroken line of this Court's decisions holding that interpretive regulations are nonbinding and do not impose enforceable requirements.

If allowed to stand, the decision of the lower court will alter radically the nature of product liability litigation. Claims of nonreporting or late reporting could be made in virtually any personal injury case involving a consumer product. Because the plaintiff has invoked Section 23, both common law and federal claims could be filed in or removed to a federal court under the doctrine of pendent jurisdiction. Moreover, the plaintiff's allegations would expand the scope of evidence that is discoverable and admissible, and trial courts and juries would be required to interpret and apply complex administrative guidelines that never were intended to be enforced in private litigation. At a time of crisis in the product liability insurance and compensation system and of intense public interest in reform of product liability law, imposing these additional burdens on manufacturers and the courts would place a federal statute squarely in the path of progress.

The lower court decisions construing Section 23 are divided,[2] and further development of the case law cannot be expected to resolve the growing split in authority. This Court

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[2] *Compare Kahn* v. *Sears Roebuck & Co.*, 607 F. Supp. 957 (N.D. Ga. 1985) (finding no private cause of action); *Morris* v. *Coleco Industries*, 587 F. Supp. 8 (E.D. Va. 1984) (same); *with Drake v. Lochinvar Water Heater, Inc.*, 618 F. Supp. 549 (D. Minn. 1985) (recognizing private right of action), *appeal filed sub. nom. Drake v. Honeywell*, No. 85-5179-MN (8th Cir. June 5, 1985); *Wilson* v. *Robertshaw Controls Co.*, 600 F. Supp. 671, 673-75 (N.D.

(footnote continues)

should address this important issue of federal law by clarifying the narrow scope of Section 23, reaffirming the basic administrative law principles embodied in its decisions, and preventing the "federalizing" of product liability law that will occur if Section 23 claims continue to proliferate in federal and state courts.

I. THE DECISION BELOW VIOLATES BASIC PRINCIPLES OF ADMINISTRATIVE LAW AND CONFLICTS WITH THIS COURT'S DECISIONS BY RECOGNIZING A PRIVATE RIGHT OF ACTION FOR NONCOMPLIANCE WITH UNENFORCEABLE INTERPRETIVE REGULATIONS

This Court repeatedly has refused to create private remedies under regulatory statutes in the absence of Congressional authorization. As numerous decisions caution, courts must not "engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide." *California* v. *Sierra Club,* 451 U.S. 287, 297-98 (1981). *See also Middlesex County Sewerage Authority* v. *National Sea Clammers Association,* 453 U.S. 1 (1981); *Northwest Airlines Inc.* v. *Transport Workers Union,* 451 U.S. 77 (1981); *Texas Industries, Inc.* v. *Radcliff Materials, Inc.,* 451 U.S. 630 (1981).

The decision below violates this principle by expanding the private remedy provisions of the CPSA beyond the boundaries that Congress established. Section 23 of the Act authorizes private suits only for violations of CPSC "rules or orders"; Congress did not create a private remedy for conduct alleged to violate the statute itself. The only binding reporting requirements under the CPSA are contained in a statutory provision, Section 15(b), and thus cannot provide a basis for a damage suit under Section 23.

(footnote continued)

Ind. 1985) (same); *Payne* v. *A.O. Smith Corp.,* 578 F. Supp. 733, 738 (S.D. Ohio 1983) (same); *Young* v. *Robertshaw Controls Co.,* 560 F. Supp. 288, 293 (N.D.N.Y. 1983) (same); and *Butcher* v. *Robertshaw Controls Co.,* 550 F. Supp. 692, 695-96 (D. Md. 1981) (same). The Eighth Circuit recently heard oral argument in *Drake* v. *Honeywell, Inc.,* No. 85-5179-MN.

The Minnesota Supreme Court nonetheless recognized a private cause of action for alleged nonreporting under Section 15(b) because the CPSC has issued interpretive regulations, codified at 16 C.F.R. Part 1115, which provide guidance on the meaning of the statutory requirements (App. 14a). These regulations, the court held, constitute "rules" for purposes of Section 23 (App. 15a). This reasoning overlooks another essential requirement for suit under Section 23—that the "rules" invoked by the plaintiff must have been "violated." 15 U.S.C. § 2072(a) (App. 5e). The notion that the CPSC's interpretive regulations can be "violated" is in direct conflict with accepted administrative law principles repeatedly affirmed by this Court.

The Court has emphasized that interpretive regulations are "not controlling" and "constitute a body of experience and informed judgments to which courts and litigants may properly resort for guidance." *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). Since interpretive rules are not issued pursuant to delegated legislative authority, they are not legally binding. Their purpose is merely to provide guidance to regulated parties by explaining how the agency interprets and intends to enforce the substantive statutory provision. *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 301-02 (1979); *Batterton* v. *Francis*, 432 U.S. 416, 424-26 (1977); *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 141-42 (1976); *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 139-40 (1944).

If the agency believes that a person has failed to perform a statutory duty, it must demonstrate a violation of the underlying statutory requirement; it is not enough to demonstrate a violation of the agency's interpretive rule since the rule has no binding effect. In construing the scope of the statute, a court may consider the agency's interpretation, but it will not be controlling. Rather, the court must determine whether the challenged conduct is a violation of the *statute*, not the interpreting regulation. *See, e.g., Skidmore* v *Swift*, 323 U.S. 134, 140 (1944); *Fmali Herb, Inc.* v. *Heckler*, 715 F.2d 1385, 1387 (9th Cir. 1983); *Production Tool* v. *Employment & Training Administration*, 688 F.2d 1161, 1165 (7th Cir. 1982).[3]

[3] As Professor Davis notes, the distinction between substantive and interpretive rules is "deeply established" in federal court jurisprudence and in

(footnote continues)

The CPSA does not contain a grant of general rulemaking authority, and Section 15(b) does not empower the Commission to promulgate rules implementing the statutory reporting requirements. Accordingly, at the time of their promulgation, the Commission expressly designated its regulations under Section 15(b) as "interpretive." It also explained that an interpretive rule "offers guidance as to what a law means but does not itself have the force and effect of law." 43 Fed. Reg. 34,988, 34,990 (1978)(App. 2f-3f). The Commission underscored that noncompliance with its regulations would not, in and of itself, provide a basis for enforcement action: "[A] firm charged with violating Section 15 through acts which are contrary to these rules will always have an opportunity to urge the reasonableness of its actions under the circumstances, thereby defeating the accusation." (App. 3f) [4]

The opinion below departs radically from the Commission's intentions. According to the decision, companies sued by private litigants will be judged against the provisions of the Commission's regulations—and not, as the CPSC intended, against the requirements of the statute itself. Under this approach, guidelines that the Commission considers nonbinding would be controlling in private damage suits, and tort plaintiffs could therefore enforce regulations that the issuing agency considers unenforceable.

While recognizing the difference between interpretive and substantive regulations, the Minnesota Supreme Court concluded that "interpretive rules can be binding" where held valid

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(footnote continued)

administrative law theory. K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 5:03, at 147 (1976).

[4] The Commission's recognition that 16 C.F.R. Part 1115 is interpretive in character is controlling. *See Whirlpool Corp.* v. *Marshall*, 445 U.S. 1, 11 & n.15 (1980); *General Motors* v. *Ruckelshaus*, 724 F.2d 979, 985 & n.36 (D.C. Cir. 1983) (where "nothing in the record . . . suggest[s] that [the Agency] ever intended this rule to carry any weight beyond that ordinarily attending an agency's interpretation of a statute" the rule will be considered to be interpretive); *Cerro Metal Products* v. *Marshall*, 620 F.2d 964, 981 (3d Cir. 1980) (in distinguishing between interpretive and legislative rules, courts should "take the agency at its word"). *Accord New Jersey* v. *Department of Health & Human Services*, 670 F.2d 1262, 1282 (3d Cir. 1981).

by the courts and that the CPSC's regulations under Section 15(b) should receive "authoritative effect" because they represent "a reasonable interpretation of the CPSA." (App. 25a) This line of analysis conflicts with this Court's decisions holding squarely that interpretive rules are not binding. The "reasonableness" of interpretive regulations cannot change the fact that it is only the statute, not the regulation, that can be "violated." As a well-known treatise notes:

> As the name suggests, *interpretive rules* are, basically, those that interpret and apply the provisions of the statute under which the agency operates. *No sanction attaches to the violation of an interpretive rule as such; the sanction attaches to the violation of the statute, which the rule merely interprets.*

1 F. COOPER, STATE ADMINISTRATIVE LAW 174-75 (1975) (emphasis added to second sentence). The court below stood this basic proposition on its head by recognizing a private remedy for noncompliance with interpretive regulations—which are unenforceable in their own right—even though it acknowledged that violation of the underlying statutory provisions would not provide the basis for private suit.

By holding the CPSC's interpretive rules under Section 15(b) to be reasonable and valid, the court below merely determined that the rules correctly interpret the statute. But the court itself recognized that statutory reporting obligation cannot be enforced by private suit. It would be nonsensical for Congress to provide no private right to enforce the statutory provision, but grant a private right to enforce interpretive regulations that merely restate what the statute already provides.

Equally important, under the approach followed by the Minnesota Supreme Court, the existence of a private cause of action would depend on whether the court in a private damage action upholds the reasonableness of the particular portions of the CPSC regulations on which the plaintiff seeks to rely. Thus, the detailed and complex administrative scheme that the CPSC established would be subject to piecemeal judicial review in a variety of product liability cases. The result inevitably will be a

confusing and uneven body of case law that impedes fair and effective administration of the statutory reporting requirements.[5]

If the Court grants review, it could avert these dangers by reaffirming the nonbinding character of the CPSC's interpretive regulations and clarifying the limited scope of the private remedy provisions of Section 23.

II. THE DECISION OF THE MINNESOTA SUPREME COURT HAS IMPORTANT IMPLICATIONS FOR THE JUDICIAL SYSTEM WHICH HEIGHTEN THE NEED FOR REVIEW BY THIS COURT

The expansive reading of Section 23 that the Minnesota Supreme Court adopted has far-reaching implications for product liability litigation in state and federal courts. Given the broad definition of "consumer product" in the Act, *see* 15 U.S.C. § 2052(a), and the expansive sweep of the Commission's interpretive regulations, nearly any plaintiff could allege that the defendant manufacturer failed to file a timely report with the CPSC as required by Section 15(b). Thus, the private cause of action recognized by the lower court's decision could be asserted in virtually any case involving an allegedly defective consumer product. Section 23's provisions for recovering attorneys' fees and costs provide an additional incentive for adding such claims to product liability complaints. Not surprisingly, therefore, allegations of nonreporting or late reporting under Section 23 have proliferated in product liability litigation nationwide.[6]

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[5] The decision below illustrates these dangers. The validity of the CPSC's regulations was not briefed or argued in the court below and the court's consideration of this issue was totally unexpected. Moreover, when the regulations were published in 1978, affected segments of industry did not seek judicial review because of the Commission's assurance that the conduct of individual firms would be judged against the requirements of the statute rather than the regulations. The opinion below effectively negates this assurance by declaring—without any briefing or argument—that the regulations are "reasonable" and therefore entitled to "authoritative effect" in private litigation.

[6] We are personally aware of a large number of Section 23 claims that have been resolved or are pending. The plaintiffs' bar has sought to publicize the availability of Section 23 as an additional product liability remedy. *See,*

(footnote continues)

In cases where federal court jurisdiction is invoked under Section 23, state-law claims also could be tried in federal court under the doctrine of pendent jurisdiction. Cases filed in state court could be removed to federal court on the same basis. Recognition of a broadly applicable cause of action under Section 23 would therefore open federal courts to nondiversity product liability cases that traditionally have been the exclusive domain of state courts. As the court observed in *Morris* v. *Coleco Industries*, 587 F. Supp. 8 (E.D. Va. 1984):

> [S]uch an interpretation of the Act would for all practical purposes constitute district courts as special tribunals for the trial of product liability cases in the consumer field. Nothing I have read leads me to believe Congress intended such a sweeping change in the relative functions of state and federal courts.

Id. at 10.

Even where Section 23 claims are litigated in state courts, difficult issues of federal law would arise. At the trial of any Section 23 claim, the defendant's conduct would be measured against a highly detailed statement of policy and procedure that was designed to be implemented by an expert administrative agency,[7] not by courts or juries which lack regulatory experience. Translating the Commission's interpretive guidelines into legally enforceable requirements that can be applied by lay juries will confront judges and counsel with a difficult challenge. Of equal concern, recognition of a private cause of action for alleged nonreporting will greatly complicate the trial

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(footnote continued)

e.g., Karon, *Application of the CPSA and Proof of Failure to Warn in Product Liability Actions*, MINN. TRIAL LAW., Jan.-Feb. 1985.

[7] The regulations occupy 13 pages in the Code of Federal Regulations. They address a variety of subjects, including the deadlines for filing initial and follow-up reports, the contents of such reports, the definition of "defect" under Section 15(b), the types of information which may give rise to reporting responsibilities, the criteria for determining when a product "could present a substantial product hazard", and the circumstances under which the Commission will seek remedial action. *See* App. 4f-22f.

of product liability cases by raising difficult and highly speculative issues of causation [8] and by enlarging the nature and scope of evidence that may be sought during discovery and introduced at trial.[9]

By imposing expanded liabilities on manufacturers and increased litigation burdens on courts, recognition of a private remedy for reporting violations under Section 23 would undermine the growing movement to reform the product liability system. It would be particularly unfortunate to allow such a development at a time of widespread concern about the availability of adequate insurance protection to manufacturers and the capacity of the courts to place meaningful limits on the compensation provided through litigation.[10]

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[8] Proof that a company knowingly violated the interpretive reporting requirements would not alone justify an award of damages; the plaintiff would need to show that such a violation *caused* his injury because the Commission failed to order a remedy that would have prevented the injury from occurring. To address this issue, the jury would have to determine: (1) when any duty to report arose; (2) whether, after receiving a report, the Commission would have determined that the product in question posed a "substantial product hazard" as defined by the Act; and (3) whether the Commission would then have ordered a remedy that would have prevented plaintiff's damages. Each of these determinations calls for multiple speculations that a lay jury is poorly equipped to make. Under the Act, moreover, Congress committed the evaluation of potential hazards and the choice of remedial measures exclusively to the expertise and judgment of the Commission. *See* 15 U.S.C. § 2064(c), (d), (f).

[9] For example, the plaintiff may pursue broad-ranging discovery concerning the design and safety history of the defendant's product, and the involvement of management in safety-related decisions, in an effort to show that the company was in possession of information reportable under Section 15(b). Moreover, in cases where a report was filed with the CPSC but the plaintiff alleges it was untimely, discovery may encompass all communications between the manufacturer and the agency as well as the CPSC's decision-making process once it received the defendant's report.

[10] A presidential task force appointed to study the liability insurance crisis has noted that the number of product liability cases filed annually in federal district courts has increased 758% since 1974. *See* Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability 45 (Feb. 1986). The task force observed that "[t]he recent explosion in tort liability and the lack of legal certainty is a particularly noxious combination that seems to react almost synergistically in promoting the insurance availability/affordability

(footnote continues)

There is no evidence that Congress anticipated the far-reaching consequences of allowing private enforcement of Section 15(b) and concluded that such suits would contribute to the regulatory objectives of the CPSA.[11] The CPSA is primarily intended to protect the public from potential product hazards rather than to provide redress for individual consumers after injuries occur. As Congress undoubtedly reasoned, individual consumers injured by allegedly defective products have a broad array of remedies under the common law. Moreover, aided by the Department of Justice, the Commission can invoke a wide range of sanctions against companies that violate Section 15(b). Thus, a private cause of action for noncompliance with Section 15(b) is not necessary either to compensate injured plaintiffs or to enforce the statutory reporting requirements.

Review by this Court would permit careful consideration of the important policy and practical implications of private enforcement of Section 15(b). In view of the split in authority in the lower courts, this Court should now step in to provide guidance on this important issue of federal law to the many state and federal courts where Section 23 cases are pending or will be filed in the future.

(footnote continued)

crisis." *Id.* at 51. President Reagan has endorsed the task force recommendations to curtail the dramatic rise in tort litigation. *See* Wash. Post, Mar. 31, 1986, at 1, col. 5.

[11] The legislative history of the CPSA reveals that Congress specifically intended to grant private parties the right to bring a private cause of action for violations of substantive rules or orders, including orders issued by the Commission under its Section 15 authority to require manufacturers to give public notice about, or repair or recall, defective consumer products. H.R. REP. NO. 1153, 92d Cong., 2d Sess. 47-48 (1972). By contrast, the legislative history is devoid of any suggestion that Congress intended to permit private parties to assert a cause of action for noncompliance with the Section 15(b) reporting requirement or with interpretive regulations construing that requirement. Congress easily could have broadened the coverage of Section 23 to include nonreporting under Section 15(b), or violations of statutory provisions generally, if it believed a private remedy for such violations was desirable.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

STATE OF MINNESOTA

IN SUPREME COURT

C8-84-188

Court of Appeals

Amdahl, C. J.
Took no part, Coyne, J.

Filed September 20, 1985
Wayne Tschimperle
Clerk of Appellate Courts

JANET SWENSON, individually and as trustee for the heirs at law and next of kin of EDWARD C. SWENSON,

Respondent,

vs.

The EMERSON ELECTRIC COMPANY, defendant and third party plaintiff, petitioner,

Appellant,

The A. O. SMITH CORPORATION, defendant and third party plaintiff,

Appellant,

vs.

LAKE REGION COOPERATIVE, third party defendant,

Respondent.

SYLLABUS

1. Plaintiff's claim against defendants based upon the federal Consumer Product Safety Act is not barred by the

statute of limitations because, under Minn.R.Civ.P. 15.03, it relates back to plaintiff's timely claims of negligence, negligent failure to warn of a defect, and strict product liability.

2. The federal Consumer Product Safety Act, 15 U.S.C. § 2051 *et seq.* (1982), provides a private cause of action for violation of the Consumer Product Safety Commission's substantial product hazard reporting regulations.

Affirmed.

Heard, considered, and decided by the court en banc.

OPINION

AMDAHL, Chief Justice.

We must decide whether the federal Consumer Product Safety Act, 15 U.S.C. § 2051 *et seq.* (1982), provides a private cause of action for violation of the Consumer Product Safety Commission's substantial product hazard reporting regulations. Plaintiff Janet Swenson sought to amend her complaint to include a claim under the Act. Defendants Emerson Electric Company and A. O. Smith Corporation opposed amendment of the complaint, contending that plaintiff has no cause of action under the Consumer Product Safety Act, and that the claim under the Act was barred by the statute of limitations. The trial court granted plaintiff leave to amend her complaint, but certified the issues raised by the amendment to the Court of Appeals. The Court of Appeals affirmed. *Swenson v. The Emerson Electric Co.*, 356 N.W. 2d 313 (Minn.App. 1984). We granted review and now affirm the decision of the Court of Appeals.

In September of 1977, Edward Swenson acquired a Mark I Glasscote water heater designed, manufactured, and distributed by defendant A. O. Smith Corporation. The water heater was equipped with a gas control valve, or thermostat, manufactured by defendant Emerson Electric Company. Swenson placed the water heater in his residence. On September 10, 1979, Swenson was attempting to relight the pilot light on the water heater when an explosion and flash fire occurred. The explosion and fire severely injured Swenson. He died on September 21, 1979.

Plaintiff commenced this action on April 10, 1981, alleging that a defect in the water heater and thermostat permitted LP gas to escape from the gas control valve. This gas, ignited when Edward Swenson tried to light the pilot light, caused the explosion and fire which resulted in his death. Plaintiff Janet Swenson, decedent's wife, sued defendants A. O. Smith Corporation and Emerson Electric Company for damages based upon negligence in design and manufacture of the water heater, negligent failure to warn of the defect, breach of the implied warranties of merchantability and fitness, and strict liability. Plaintiff also sought punitive damages, alleging that defendants acted with willful indifference to the rights and safety of others.

Plaintiff filed an amended complaint on March 17, 1982, with the consent of the defendants. On June 14, 1983, plaintiff moved for leave to file a second amended complaint. In the second amended complaint, plaintiff expanded upon her claim for punitive damages, clarified her strict liability claim, and sought to add to the complaint a claim for damages under the federal Consumer Product Safety Act. Defendants Emerson and Smith opposed the motion for leave to file the second amended complaint on the grounds that plaintiff has no cause of action under the Consumer Product Safety Act, and that the claim under the Act was barred by the statute of limitations.

The trial court granted plaintiff leave to file the second amended complaint on November 22, 1983. Defendants thereafter filed a motion to dismiss the punitive damages claim and the claim based upon the Consumer Product Safety Act, renewing their contentions that the plaintiff did not have a cause of action under the Act and that the statute of limitations barred assertion of the claim. In the alternative, defendants asked the trial court to certify the issues raised to the Court of Appeals. On January 31, 1984, the trial court denied the motion to dismiss in all respects, but certified the issues raised by defendants to the Court of Appeals as important and doubtful.

Three questions were certified to the Court of Appeals:

1. Does Section 23 of the Consumer Products Safety Act, 15 U.S.C. § 2072, provide a private right of

action for violation of the non-binding interpretive regulation issued by the Consumer Products Safety Commission at 16 CFR Part 1115?

2. Does the Section 23 claim asserted in Plaintiff's Second Amended Complaint arise out of the "same transaction or occurrence" that is the subject of Plaintiff's original claims, within the meaning of Rule 15.03 of the Minnesota Rules of Civil Procedure, so that Plaintiff's untimely filing of the CPSA claim is made timely by application of the Minnesota Relation-Back Doctrine?

3. Does Subdivision 4 of Minnesota Statutes § 573.02, as amended by Chapter 347 of Laws of Minnesota for 1983, have retroactive application to Wrongful Death lawsuits which do not result from an intentional act constituting murder, so that Plaintiff should be permitted to seek punitive damages in this case arising out of an occurrence in 1979?

The Court of Appeals ruled that the alleged violation of the substantial product hazard reporting regulations arose out of the same transaction or occurrence as plaintiff's original claims, and was therefore not barred by the statute of limitations because of the relation-back doctrine. The Court of Appeals also held that an allegation of violation of the substantial product hazard reporting regulations of the Consumer Product Safety Commission constitutes a claim for which there is a private cause of action under the Consumer Product Safety Act.[1]

1. The Consumer Product Safety Act (CPSA), 15 U.S.C. § 2051 *et seq.* (1982), contains no limitations period for the commencement of actions. Where federal law does not specify a statute of limitations, the Supreme Court has said:

> [W]e do not ordinarily assume that Congress intended that there be no time limit on actions at all;

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[1] The Court of Appeals also ruled that a 1983 amendment to the wrongful death statute, permitting punitive damages in wrongful death actions, Act of June 14, 1983, ch. 347, §§ 2, 3, 1983 Minn. Laws 2397, 2397-98, did not have retroactive effect and thus did not apply to the present case. Plaintiff has not challenged this ruling on her appeal to this court.

> rather, our task is to 'borrow' the most suitable statute or other rule of timeliness from some other source. We have generally concluded that Congress intended that the courts apply the most closely analogous statute of limitations under state law.

DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 158 (1983). The Court, however,

> has not mechanically applied a state statute of limitations simply because a limitations period is absent from the federal statute. State legislatures do not devise their limitations periods with national interests in mind, and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies. 'Although state law is our primary guide in this area, it is not, to be sure, our exclusive guide.'

Occidental Life Ins. Co. v. Equal Employment Opportunity Comm'n, 432 U.S. 355, 367 (1977) (quoting *Johnson v. Railway Express Agency, Inc.,* 421 U.S. 454, 465 (1975)). In *Occidental,* the Court found that state statutes of limitation would not apply to enforcement actions brought by the EEOC under Title VII of the Civil Rights Act of 1964 because Congress had created an administrative body, the EEOC, whose function was to investigate and, hopefully, settle disputes prior to the commencement of litigation. Analogous state statutes of limitation, not enacted with such a potentially lengthy administrative process in mind, were found to frustrate Congress' intent in establishing the EEOC procedure. *Id.* at 368-69 (Court overturned district court decision applying California's 1-year limitations period to the EEOC action).

In the present case, Congress created a private right of action for damages in certain circumstances, for persons injured "by reason of any knowing (including willful) violation of a consumer product safety rule, or any other rule or order issued by the Commission." 15 U.S.C. § 2072(a) (1982). Congress specifically provided that this remedy "shall be in addition to and not in lieu of any other remedies provided by common law

or under Federal or State law." *Id.* § 2072(c). It appears that Congress intended the right of action under section 2072 to be simply another source of liability in addition to the typical claims which arise from injuries caused by consumer products: negligence, breach of warranty, and strict liability. Since the cause of action under the CPSA would arise from the same occurrences that give rise to liability under state common law, and there is no apparent overriding federal need for a uniform limitations period, the decision of the trial court and the Court of Appeals that the analogous state statute of limitations applies, was proper. *Cf. McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221, 224-26 (1958) (applying federal limitations period of Jones Act to a seaworthiness action under general admiralty law because the two claims are almost always brought together; solution thought to comport with "practicalities of admiralty personal injury litigation").

The trial court ruled, and both parties agree, that the wrongful death statute, Minn. Stat. § 573.02, subd. 1 (1984), is the source of the appropriate limitations period. That statute provides that actions must be commenced "within three years after the date of death." Edward Swenson died on September 21, 1979. Plaintiff's motion for leave to file a second amended complaint, which included for the first time the claim under the Consumer Product Safety Act, was made in June of 1983, 3 years and 9 months after Edward Swenson's death. The claim under the CPSA would thus be barred by the statute of limitations unless we find that it "relates back" to the date of the original complaint pursuant to Minn.R.Civ.P.15.03. Rule 15.03 provides:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

Defendants assert that Rule 15.03 is based on "the concept that a party who has been notified of claims concerning a given transaction has been given the notice that statutes of limitations are intended to afford." Thus, defendants conclude, an amend-

ment stating a new cause of action will not relate back to the original complaint if that complaint did not sufficiently notify the defendants of the transaction or occurrence upon which the new claim is based. Defendants then argue that the claim under the CPSA is so different from the other claims advanced by the plaintiff in the original complaint that the amendment to include the CPSA claim should not be permitted to relate back to the original complaint.

Plaintiff's original complaint asserted that defendants were liable for the death of Edward Swenson on theories of negligence in design and manufacture of the water heater, negligent failure to warn of a defective condition in the product, breach of the implied warranties of merchantability and fitness, and strict liability. The new claim seeks to establish liability for damages based upon defendants' allegedly intentional failure to report to the Consumer Product Safety Commission a defect in its product which it has reasonable basis to believe may present a "substantial product hazard," in violation of 15 U.S.C. § 2064(b) (1982).

Plaintiff argues that the causes of action in the original complaint and the cause of action under the CPSA that she now seeks to assert both arose out of the same occurrence: Edward Swenson's death. Plaintiff points out that 15 U.S.C. § 2072 requires the existence of an injury as a prerequisite to an action for damages. Plaintiff further argues that the original complaint put defendants on notice that they would have to defend themselves on the very issues involved in the CPSA claim: the alleged defect in their product and defendants' knowledge or lack of knowledge of that defect prior to the explosion that killed Edward Swenson.

Defendants contend, however, that the CPSA claim is sufficiently different from the claims in the original complaint to preclude application of the relation-back doctrine. Defendants point out that the CPSA claim involves their understanding of and compliance with Consumer Product Safety Commission (CPSC) rules, requiring examination of the relationship between defendants and the CPSC, not the relationship between defendants and the decedent.

The trial court found that the plaintiff's CPSA claim "relates back to the explosion and is, therefore, not barred by the statute." The Court of Appeals affirmed the trial court's resolution of the issue, finding that the "negligent failure to provide [warning of a product defect] claim is directly related to the alleged violation of the Act and corresponding regulation, namely the failure to report substantial product hazards." The Court of Appeals concluded that, because "appellants had notice of the conduct asserted in the amendment," the amendment related back to the original complaint and was therefore not barred by the statute of limitations.

This court has said that—

> The principle of relation back of amended pleadings existed in prior law, but it was limited to an amendment which did not state a new cause of action. The harshness of the rule was modified by a liberal construction of a 'cause of action.' In accord with this liberal application of the principle, the rule requires only that the amendment arise out of the 'conduct, transaction, or occurrence' set forth in the original pleading.

Heyn v. Braun, 239 Minn. 496, 501-02, 59 N.W.2d 326, 330 (1953). In *Heyn,* a mechanics lien case, the original complaint was based upon a written contract to which one of the named defendants was not a party. After the statute of limitations had run and at the opening of trial, the plaintiff amended his complaint to include a claim for the fair and reasonable value of the improvements, which cause of action could be asserted against the owner-defendant who was not a party to the contract. This court held that the relation-back doctrine applied to preserve the new claim despite the running of the limitations period "even though it set forth a new cause." *Id.* at 502, 59 N.W.2d at 330.

The policy of statutes of limitation is to "compel the exercise of a right of action within a reasonable time so that a defendant will have a fair opportunity to prepare an adequate defense." Note, *Federal Rule of Civil Procedure 15(c): Relation Back of Amendments,* 57 Minn. L. Rev. 83, 84 (1972). In the present case, defendants had sufficient notice in the original

complaint of the essential elements of the CPSA claim to justify application of the relation-back doctrine and therefore to prevent the claim from being barred by the statute of limitations. Defendants were clearly notified in the original complaint of the accident and injury giving rise to the CPSA claim. Defendants were also put on notice that plaintiff was going to assert that the water heater was defective and that defendants knew of the defect and negligently failed to warn consumers of it. The CPSA claim requires plaintiff to prove that the water heater was defective, that the defect created a hazard, that defendants knew of the defect, and that defendants knowingly violated the CPSC rule requiring defendants to notify the CPSC of any known hazardous defects in a consumer product. Only the allegation that defendants knowingly violated the CPSC reporting requirement was not essentially present in the original complaint. We conclude that the plaintiff's late assertion of the CPSA claim did not infringe upon defendant's preparation of an adequate defense. We therefore rule that the plaintiff's claim under the CPSA is not barred by the statute of limitations because it relates back to the original pleading.

2. The Consumer Product Safety Act provides a private cause of action at 15 U.S.C. § 207(a) (1982):

> Any person who shall sustain injury by reason of any knowing (including willful) violation of a consumer product safety rule, or any other rule or order issued by the Commission may sue any person who knowingly (including willfully) violated any such rule or order in any district court of the United States in the district in which the defendant resides or is found or has an agent * * *.

As an initial matter, the statutory language in section 2072 providing that an injured party may sue in any federal district court for violation of the CPSA, does not appear to be a grant of exclusive federal jurisdiction over CPSA claims. As the Supreme Court has stated:

> The general principle of state-court jurisdiction over cases arising under federal laws is straightforward: state courts may assume subject-matter

> jurisdiction over a federal cause of action absent provision by Congress to the contrary or disabling incompatibility between the federal claim and state-court adjudication. * * *
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> In considering the propriety of state-court jurisdiction over any particular federal claim, the Court begins with the presumption that state courts enjoy concurrent jurisdiction. * * * [T]he presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests. * * *
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> * * * It is black-letter law * * * that the mere grant of jurisdiction to a federal court does not operate to oust a state court from concurrent jurisdiction over the cause of action.

Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 477-79 (1981) (Court held that federal courts do not have exclusive jurisdiction over personal injury cases arising under the Outer Continental Shelf Lands Act despite a provision in the act granting federal district courts "original jurisdiction" over cases arising under it).

Section 2072 contains no explicit grant of exclusive jurisdiction to the federal courts. Our review of the legislative history of the CPSA does not reveal any consideration of the jurisdictional question. *See* H.R. Rep. No. 92-1153, 92d Cong., 2d Sess. 46-49 (1972); S. Rep. No. 92-835, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 4573; Conf. Rep. No. 92-1593, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 4596, 4647-50. Finally, it is unlikely that Congress intended federal courts to have exclusive jurisdiction over private actions under the CPSA because most actions in which CPSA claims are asserted would also include claims of state common law violations such as negligence, breach of warranty, and strict product liability. Any intent by Congress to

require all of these actions to be brought in federal courts would have to be explicit. We therefore conclude that state and federal courts possess concurrent jurisdiction over private causes of action under the CPSA.

Section 2072(a) provides a private cause of action for any person injured by a knowing "violation of a consumer product safety rule, or any other rule or order issued by the Commission." 15 U.S.C. § 2064(b) provides that:

> Every manufacturer of a consumer product distributed in commerce, and every distributor and retailer of such product, who obtains information which reasonably supports that such product—
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> (1) fails to comply with an applicable consumer product safety rule; or
>
> (2) contains a defect which could create a substantial product hazard described in subsection (a)(2) of this section,
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> shall immediately inform the Commission of such failure to comply or of such defect, unless such manufacturer, distributor, or retailer has actual knowledge that the Commission has been adequately informed of such defect or failure to comply.

15 U.S.C. § 2064(a)(2) defines "substantial product hazard" as

> a product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise) creates a substantial risk of injury to the public.

The CPSC did not promulgate a substantive rule under section 2064 of the CPSA. Instead, the CPSC promulgated an interpretive rule describing its views of manufacturers' obligations under section 2064.[2] *See* 43 Fed. Reg. 34,988 (1978) *codified at* 16 C.F.R. § 1115.1-.22 (1985).

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[2] A rule is characterized as interpretive, rather than legislative, if it is not issued pursuant to a legislative delegation of power to make rules having the

(footnote continues)

In introducing the interpretive rule, the CPSC said:

> The Commission considered the difference between promulgating the rule as substantive or interpretive, sought public comment on the issue * * * and has decided to promulgate the rule as interpretive.
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> A substantive rule has the force and effect of law. Thus, a violation of a substantive rule under the

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(footnote continued)

force of law *or* if the agency intends the rule to be no more than its interpretation of a statute or another rule. *General Motors Corp. v. Ruckelshaus*, 724 F.2d 979, 985 (D.C. Cir. 1983); *American Postal Workers Union v. United States Postal Serv.*, 707 F.2d 548, 558 (D.C. Cir. 1983); *Chamber of Commerce v. Occupational Safety and Health Admin.*, 636 F.2d 464, 468 (D.C. Cir. 1980); *Joseph v. United States Civil Serv. Comm'n*, 554 F.2d 1140, 1153 (D.C. Cir. 1977). An agency's characterization of a rule as interpretive or legislative, particularly if made at the time of the rule's promulgation, is accorded deference by the courts, but is not dispositive. *Ruckelshaus*, 747 F.2d at 985; *Levesque v. Block*, 723 F.2d 175, 180-81 (1st Cir. 1983); *American Postal Workers*, 707 F.2d at 559; *Chamber of Commerce*, 636 F.2d at 468; *Citizens to Save Spencer County v. United States Envtl. Protection Agency*, 600 F.2d 844, 879 n.171 (D.C. Cir. 1979) ("'[T]he label that the particular agency puts upon its given exercise of administrative power is not, for our purposes, conclusive; rather it is what the agency does in fact.' * * * This must especially be true when the label is placed on the agency's rule by counsel after the rule is promulgated in final form and the rule is undergoing court review"). A court will reject an agency's characterization of a rule as interpretive when the court determines that the agency intended to promulgate a legislative rule, did not follow the notice and comment procedures required for promulgation of a valid legislative rule, and later attempts to "save" the deficient rule by characterizing the rule as interpretive, and thus exempt from, the notice and comment procedure of 5 U.S.C. § 553(c) (1982). *See Levesque*, 723 F.2d at 181-84; *Chamber of Commerce*, 636 F.2d at 468-70; *Citizens to Save Spencer County*, 600 F.2d at 879 & n.171; *Joseph*, 554 F.2d at 1152-54.

We find that the CPSC's substantial product hazard reporting regulations are properly characterized as interpretive rules. The CPSC clearly indicated its intent to promulgate the rules as interpretive, and continues to consider them to be interpretive. *See* 43 Fed. Reg. 34,988, 34,990 (1978); 49 Fed. Reg. 13820 (1984). Also, because the CPSC promulgated the substantial product hazard reporting regulations after following notice and comment procedures, 43 Fed. Reg. 34,988 (1978), the rules were obviously not characterized as interpretive as a device to avoid following that procedure. The substantial product hazard reporting regulations are, therefore, interpretive rules.

> CPSA is equivalent to a violation of the CPSA. In contrast, an interpretive rule offers guidance as to what a law means, but does not itself have the force and effect of law. A violation of an interpretive rule is not necessarily a violation of law; the failure to comply with an interpretive rule *is* a violation of the law under which it is issued only if the rule reasonably interprets that law. In issuing these rules under section 15 of the CPSA, the Commission believes it has reasonably interpreted the provisions and obligations of that section. However, a firm charged with violating section 15 through acts which are contrary to these rules will always have an opportunity to urge the reasonableness of its actions under the circumstances, thereby defeating the accusation.
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> The Commission agrees with the consumer commentators who stated that the Commission could address the issues of its authority and the desirability of issuing a substantive regulation at a later date. They indicated that an interpretive regulation will serve a dual purpose: It will put subject firms fairly on notice of the Commission's view of the law, and it will give the Commission an opportunity to assess the reasonableness and effectiveness of this rule. The Commission agrees and is, therefore, issuing this rule as an interpretation of section 15.

43 Fed. Reg. 34,988, 34,990 (1978).

The issue presented in this case is whether an alleged violation of the interpretive rule promulgated to clarify the requirements of section 2064 of the CPSA states a cause of action under section 2072 of the CPSA. The trial court followed *Young v. Robertshaw Controls Co.*, 560 F.Supp. 228 (N.D.N.Y. 1983), in ruling that such an action was permitted by section 2072. The Court of Appeals agreed, basing its ruling on the plain language of section 2072. The Court of Appeals noted that section 2072 provides a private cause of action for knowing violation of a consumer product safety rule or "any

other rule or order issued by the Commission." The federal Administrative Procedure Act defines "rule" as—

> the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency * * *.

5 U.S.C. § 551(4) (1982). Because the interpretive rule codified at 16 C.F.R. § 1115.1-.22 interprets section 2064 of the CPSA, the Court of Appeals held that it is a "rule issued by the Commission," as "rule" is defined in the Administrative Procedure Act, and that a private cause of action under section 2072 can therefore be asserted for violation of it. The Court of Appeals also relied upon federal precedent for recognition of such a cause of action under section 2072.

We agree with the trial court and the Court of Appeals and therefore hold that section 2072 of the federal Consumer Product Safety Act provides a private cause of action for violation of the Consumer Product Safety Commission's substantial product hazard reporting regulations, codified at 16 C.F.R. § 1115.1-.22. We base our holding on the plain language of section 2072, the relevant federal precedent, and general principles of federal administrative law.

Our first task in interpreting a statute is simply to examine the language of the statute and, "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Section 2072 provides a private cause of action to any person injured by a knowing "violation of a consumer product safety rule, or any other rule or order issued by the Commission." 15 U.S.C. § 2072(a). The CPSA defines a "consumer product safety rule" as a rule which establishes performance or labeling requirements for a product or which bans a product as hazardous. 15 U.S.C. §§ 2052(a)(2), 2056(a). The CPSA does not define "rule" as used in the phrase "any other rule or order

issued by the Commission." We therefore construe the statute literally and conclude that violation of "any other rule * * * issued by the Commission" gives rise to a private right of action under section 2072. Because the definition of "rule" in the federal Administrative Procedure Act includes interpretive rules, *see* 5 U.S.C. § 551(4), violation of an interpretive rule issued by the CPSC, such as the substantial product hazard reporting regulations at issue in this case, gives rise to a private right of action under the plain language of section 2072. The legislative history of the CPSA reflects no attempt to define "rule" as used in section 2072, and contains no discussion of the distinction between substantive and interpretive rules. *See* H.R. Rep. No. 92-1153, 92d Cong., 2d Sess. 47-48 (1972); S. Rep. No. 92-835, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 4573; Conf. Rep. No. 92-1593, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 4596, 4650. We therefore find no "clearly expressed legislative intention" that contradicts the plain meaning of the section 2072.

Our conclusion is supported by a majority of the federal courts that have ruled on this issue. A private cause of action for noncompliance with the substantial product hazard reporting regulations was first recognized in *Butcher v. Robertshaw Controls Co.*, 550 F. Supp. 692 (D. Md. 1981). *Butcher* involved a suit over injury sustained by the explosion of a water heater. Plaintiff sought to recover damages based upon allegations of fraud, negligence, and strict liability. Plaintiff also asserted a claim under the CPSA, alleging that the defendant manufacturer violated the CPSC's substantial product hazard reporting regulations. The court noted that the CPSC is authorized to promulgate two types of rules under the CPSA, "consumer product safety rules" and administrative rules. Consumer product safety rules are designed to prohibit the manufacture and sale of dangerous products; administrative rules aid the CPSC in the promulgation of consumer product safety rules by mandating disclosure of product defects. *Id.* at 695-96. The court then considered the language of section 2072, which provides a private cause of action for a knowing

violation of a consumer product safety rule *or* "any other rule or order issued by the Commission." Since Congress did not limit the private cause of action to violations of consumer product safety rules, the court concluded that a violation of a disclosure rule was actionable under section 2072. *Id.* at 698-99.

In *Young v. Robertshaw Controls Co.*, 560 F.Supp. 288, a second federal district court upheld the result reached in *Butcher.* The plaintiff in *Young* was seeking to recover damages for the death of her husband as a result of the explosion of a water heater in their home. The court noted that the substantial product hazard reporting regulation interprets the manufacturer's statutory duty to disclose substantial product hazards. The court held that this rule fit the language "any other rule or order of the Commission," and that its violation was therefore actionable under section 2072. The court noted that an interpretative rule is included in the definition of "rule" in the federal Administrative Procedure Act and that section 2072 contains no indication that Congress meant to exclude interpretive rules from "rule" as used in section 2072. *Id.* at 292-93 & n.8. Three other federal district courts have followed the holdings of *Butcher* and *Young. See Drake v. Lochinvar Water Heater, Inc.*, No. 3-83 CIV 663, slip. op. at 5-8 (D.Minn. March 21, 1985) (this decision was certified to the Eighth Circuit Court of Appeals on April 26, 1985); *Wilson v. Robertshaw Controls Co.*, 600 F.Supp. 671, 673-75 (N.D. Ind. 1985); *Payne v. A. O. Smith Corp.*, 578 F.Supp. 733, 738 (S.D. Ohio 1983).

One federal district court has held that section 2072 of the CPSA does not grant a private cause of action for violation of the interpretive rule governing disclosure of substantial product hazards. *Kahn v. Sears Roebuck and Co.*, No. C 82-1483 A, slip. op. (N.D. Ga. March 26, 1985). In *Kahn,* the court rejected the reasoning in *Butcher, supra,* and *Young, supra,* and found that *Morris v. Coleco Indus.*, 587 F.Supp. 8 (E.D. Va. 1984), "provides the better rule." In *Morris,* the court found that there is no private action under section 2072 for an asserted violation of section 2064 of the CPSA. Section 2064 requires a

manufacturer to report to the CPSC any information it obtains that reasonably supports the conclusion that its product contains a defect which could create a substantial product hazard. The *Morris* court ruled that:

> Specific provisions dealing with a failure to report are contained in the Act. Sections 2069 and 2070 provide civil and criminal penalties as a means for enforcing the disclosure requirements of § 2064. ***Further, the requirement to disclose is not a requirement based upon a rule or order of the Commission.*** It is a requirement predicated upon the statute itself.

Id. at 9 (emphasis added). *Morris,* in contrast to the present case, did not involve an alleged violation of the interpretive rule promulgated to explain section 2064, but an alleged violation of the statute itself. Section 2072 does not have language allowing a private action for violation of the statute, but only for violation of rules promulgated under the statute. *Morris,* therefore, is not contrary to *Butcher, Young,* and the line of cases following their reasoning. The *Kahn* court relied on *Morris,* which is distinguishable, to hold that section 2072 authorizes a private cause of action only for violation of a substantive CPSC rule, and not for violation of a CPSC interpretive rule. We therefore decline to adopt the *Kahn* holding and follow instead the majority of the federal courts which have ruled on this issue. We note that the two courts which have provided the most detailed analysis of the issue have ruled that section 2072 allows the private cause of action that plaintiff Swenson seeks to assert here. *See Young,* 560 F.Supp. at 291-93; *Butcher,* 550 F.Supp. at 694-99.

Defendants Emerson and Smith assert that, despite the apparent plain meaning of section 2072 and despite the rulings of several federal courts that section 2072 grants a private cause of action for violation of the interpretive rule regarding disclosure of substantial product hazards, recognition of such a cause of action is contrary to "fundamental principles of administrative law" and would lead to absurd results. Defendants argue that interpretive rules do not have the force and

effect of law, are therefore not binding regulations, and thus cannot be "violated" for purposes of giving rise to a cause of action under section 2072. Defendants also argue that allowing private parties to sue for damages for violation of interpretive rules would improperly convert interpretive rules into substantive, binding rules. Defendants assert that recognition of the private cause of action plaintiff seeks would be illogical because private litigants would then be allowed to enforce a CPSC rule that the CPSC itself could not enforce. Finally, defendants contend that because an interpretive rule is not itself binding, violation of an interpretive rule is really a violation only of the statute the rule interprets. Defendants note that section 2072 does not provide a private right of action for violation of the CPSA itself, but only for violation of consumer product safety rules and "any other rule or order issued by the Commission."

The argument advanced by the defendants hinges on the assumption that interpretive rules, unlike legislative rules, do not create binding obligations. This assumption reflects an incorrect understanding of the distinction between legislative and interpretive rules in federal administrative law. Both legislative and interpretive rules can be invalidated by the courts; both legislative and interpretive rules can be held valid by the courts. If valid, the rule has binding effect. *See, e.g., Batterton v. Francis,* 432 U.S. 416 (1977) (Court upheld a legislative rule); *American Postal Workers Union v. United States Postal Serv.,* 707 F.2d 548 (D.C. Cir. 1983) (court upheld an interpretive rule as valid and permitted agency to follow it in administering its responsibilities under the statute); *Cerro Metal Prods. v. Marshall,* 620 F.2d 964 (3d. Cir. 1980) (court invalidated an interpretive rule); *Joseph v. United States Civil Serv. Comm'n,* 554 F.2d 1140 (D.C. Cir. 1977) (court invalidated a legislative rule for procedural deficiencies in its promulgation).

The distinction between legislative and interpretive rules in federal administrative law is the scope of review used by the courts in assessing their validity:

> Legislative rules are said to have the 'force and effect of law'—*i.e.*, they are as binding on the courts as any statute enacted by Congress. * * * 'A reviewing court is not free to set aside those regulations simply because it would have interpreted the statute in a different manner.' * * * Legislative rules are valid so long as they are reasonably related to the purposes of the enabling legislation, * * * promulgated in compliance with statutory procedures,* * * and not arbitrary or capricious. * * * Interpretive rules, in contrast, have only persuasive force. Such rules are entitled to varying degrees of deference or weight, but a reviewing court ordinarily is free to substitute its own view of the relevant statute.

Production Tool Corp. v. Employment and Training Admin., 688 F.2d 1161, 1165 (7th Cir. 1982). Interpretive rules,

> while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

Thus, when courts refer to legislative rules as having the "force and effect of law," they mean that the validity of legislative rules will be tested under a deferential scope of review that acknowledges their promulgation pursuant to a delegation of legislative power. The characterization of interpretive rules as *not* having "the force and effect of law" means that the courts do not accord these rules the deference that they

accord a statute or legislative rule. Interpretive rules can be binding, but simply must survive closer scrutiny than legislative rules in order to be found valid and authoritative. Defendants' assertion that all interpretive rules are nonbinding is therefore incorrect:

> Interpretive rules sometimes have force of law and sometimes not. Interpretive rules cannot be binding on courts, like statutes, but courts, without being bound by them, may give them authoritative effect that equals or approximates force of law.

2 K. Davis, Administrative Law Treatise, § 7:13, at 59 (2d ed. 1979).

The theoretical basis for the differing scopes of review of legislative and interpretive rules is twofold. First,

> A legislative rule is the product of an exercise of delegated legislative power to make law through rules. An interpretive rule is any rule an agency issues without exercising delegated legislative power to make law through rules.

Id. § 7:8, at 36. Legislative rules receive more deference from the courts than interpretive rules because they are promulgated under authority delegated by Congress to an agency to make rules having the authority of statutes. Second, the Administrative Procedure Act requires legislative rules to be promulgated using the notice and comment procedures outlined in 5 U.S.C. § 553 (1982). Interpretive rules are exempt from this requirement. 5 U.S.C. § 553(b)(A). As described by one court,

> The APA notice and comment procedures exist for good reason: to ensure that unelected administrators, who are not directly accountable to the populace, are forced to justify their quasi-legislative rulemaking before an informed and skeptical public.

New Jersey v. Department of Health and Human Serv., 670 F.2d 1262, 1281 (3d Cir. 1981). Thus, because interpretive rules are

not promulgated pursuant to delegated legislative power, and their promulgation need not follow the APA's notice and comment procedure, courts evaluate their validity under stricter standards than pertain to the review of legislative rules.

Courts examine a number of factors in determining the authoritative effect of an interpretive rule. The authoritative effect of an interpretive rule is enhanced if it represents a longstanding position of the agency and if it was promulgated near the time the agency's enabling act was passed. *General Electric Co. v. Gilbert,* 429 U.S. 125, 140-46 (1976). An interpretive rule "is entitled to deference unless it can be said not to be a reasoned and supportable interpretation of the Act." *Whirlpool Corp. v. Marshall,* 445 U.S. 1, 11 (1980). Thus, an interpretive rule will be given authoritative effect if it is a permissible gloss on the statute in light of the statute's language, structure, and legislative history. *Id.* An interpretive rule need not be the only reasonable interpretation of a statute to survive scrutiny, but cannot contradict the plain meaning of the statute and its legislative history. *Fmali Herb, Inc. v. Heckler,* 715 F.2d 1385, 1387 (9th Cir. 1983). Added deference will be given to an interpretive rule promulgated according to the notice and comment procedures of the Administrative Procedure Act. *Production Tool Corp.,* 688 F.2d at 1167.

We now examine the CPSC's substantial product hazard reporting regulations in light of these principles. The CPSA was designed to provide the federal government with "a major role in protecting the consumers from unreasonable risks of death, injury, or serious or frequent illness associated with the use or exposure to consumer products." H.R. Rep. No. 92-1153, 92d Cong., 2d Sess. 21 (1972). The CPSA was designed to set up an independent regulatory agency, the CPSC, to collect information on injuries related to consumer products, establish necessary safety standards for consumer products, and enforce compliance with those safety standards. *Id.* Prior to the enactment of the CPSA, a study of consumer product safety regulation found state and local laws to be a " 'hodgepodge of tragedy-inspired responses to challenges which cannot be met

by restricted geographical entities.' " *Id.* at 23. Federal consumer product safety regulation prior to the CPSA was found to be

> burdened by unnecessary procedural obstacles, circumscribed investigative powers, inadequate and ill-fitting sanctions, bureaucratic lassitude, timid administration, bargain-basement budgets, distorted priorities, and mis-directed technical resources.

Id. at 22-23. It was also noted that there was "no central facility for the systematic collection and evaluation of injury data." *Id.* at 23. It was therefore recommended to Congress that the

> Federal Government should abandon its traditional case by case approach to product safety and consolidate in a single agency authority sufficient to regulate the full spectrum of products which are sold to or used by consumers.

Id. at 24. It was recommended that Congress establish a "new independent regulatory commission with comprehensive powers to minimize or eliminate unreasonably hazardous products." *Id.*

The Consumer Product Safety Act, enacted in 1972, established the Consumer Product Safety Commission as an independent regulatory commission. 15 U.S.C. § 2053(a)(1982). The purpose of establishing the CPSC was to "protect the public against unreasonable risks of injury associated with consumer products," "develop uniform safety standards for consumer products," and "promote research and investigation into the causes and prevention of product-related * * * injuries." *Id.* § 2051(b). The CPSC was instructed to establish an Injury Information Clearinghouse for the collection and analysis of injury data. *Id.* § 2054(a)(1). The CPSA required manufacturers, distributors, and retailers to report to the CPSC any information they obtain which "reasonably supports the conclusion" that a consumer product contains a "defect which could create a substantial product hazard." § 2064(b). If the

CPSC determines that the product defect reported presents a substantial product hazard, it can require a manufacturer, distributor, or retailer to notify the general public of the defect; notify the consumers of the product of the defect; order that the defect be repaired; order the product replaced with a safe product; or order refund of the purchase price of the product. *Id.* § 2064(c)-(d).

The CPSC is empowered by the Act to promulgate consumer product safety rules expressed either in terms of performance requirements or warning requirements. *Id.* § 2056(a). If the CPSC determines that a product presents an unreasonable risk of injury which cannot not [sic] be cured by a feasible consumer product safety rule, it may promulgate a rule declaring the product a banned hazardous product. *Id.* § 2057. If the CPSC determines that a product presents "unreasonable risk of death, serious illness, or severe personal injury," it may file an action in court to seize the product as an "imminently hazardous consumer product." *Id.* § 2061(a). Failure to properly disclose product defects which could create a substantial product hazard, or failure to comply with a consumer product safety rule, subjects a manufacturer, distributor, or retailer to civil or criminal penalties. *See id.* §§ 2068, 2069, 2070.

The disclosure requirements imposed by the CPSA upon manufacturers, distributors, and retailers are crucial to the attainment of the CPSA's primary goal: the protection of consumers. As the CPSC has said:

> [substantial product hazard] reports enable the Commission to obtain information at an early stage from knowledgeable sources * * *. These reports provide a key basis for evaluating a potential hazard and the need, if any, for corrective action in the form of public notice and/or recall, repair or replacement of the product * * * or the possible need for rulemaking or voluntary standards efforts.

49 Fed. Reg. 13820 (1984). The CPSC can protect consumers from dangerous consumer products only if product hazards are brought to its attention.

The substantial product hazard reporting regulation, codified at 16 C.F.R. § 1115.1-.15 (1985), was published as a proposed rule in 1977. 42 Fed. Reg. 46720 (1977). The CPSC followed notice and comment procedures and held two public hearings on the rule before issuing it as an interpretive rule in 1978. 43 Fed. Reg. 34,988 (1978). The reporting rule provides manufacturers a 10-day time period to conduct a "reasonably expeditious investigation in order to evaluate the reportability of a death or grievous bodily injury or other information." 16 C.F.R. § 1115.14(d). Once the manufacturer's investigation reveals "information which reasonably supports the conclusion that [its consumer] product fails to comply with an applicable consumer product safety rule or contains a defect which could create a substantial product [hazard]," the manufacturer has 24 hours to report to the CPSC, by telephone or in writing, the name of the product, the nature of the defect, and the nature of the risk of injury associated with the product. *Id.* §§ 1115.13(c), 1115.14(c), (e). After the initial report, a more detailed full report must be filed with the CPSC. *Id.* § 1115.13(d).

The rule then defines a product "defect" as a:

> fault, flaw, or irregularity that causes weakness, failure, or inadequacy in form or function. A defect, for example, may be the result of a manufacturing or production error; that is, the consumer product as manufactured is not in the form intended by, or fails to perform in accordance with, its design. * * * [A] product may contain a defect even if the product is manufactured exactly in accordance with its design and specifications, if the design presents a risk of injury to the public. * * * A defect can also occur in a product's contents, construction, finish, packaging, warnings, and/or instructions. With respect to instructions, a consumer product may contain a defect if the instructions for assembly or use could allow the product, otherwise safely designed and manufactured, to present a risk or injury.

Id. § 1115.4. If the manufacturer discovers information reasonably supporting the conclusion that a product defect exists, the manufacturer must then assess whether the defect could create a substantial product hazard. *Id.* If the defect *could* present such a hazard, a timely report of the potential hazard must be made to the CPSC. *Id.*

It is apparent that several factors support giving the substantial product hazard reporting regulations authoritative effect. We note first that notice and comment procedures, not required for the promulgation of interpretive rules, were employed in the promulgation of the substantial product hazard reporting regulations, entitling the regulations to added deference. Also, in its adoption of the final regulations, the CPSC thoroughly summarized the views of the commentators on its proposed regulation, and carefully explained its reasoning in adopting or refusing to adopt changes in the regulation proposed by commentators. *See* 43 Fed. Reg. 34,988-98 (1979). The thoroughness evident in the CPSC's consideration of the rule entitles it to greater weight.

Finally, the rule is a reasonable interpretation of the CPSA in light of the language of the disclosure provision and the structure and purposes of the CPSA. The CPSA was enacted with a broad remedial purpose: the protection of consumers from unreasonable risk of injury due to consumer products. The disclosure requirement of the CPSA is crucial to the attainment of the CPSA's purpose because it is the source of the information needed by the CPSC to identify dangerous consumer products and protect the public from them. We find the broad definition of defect in the substantial product hazard reporting regulations to be a reasonable interpretation of what must be reported to the CPSC. The short time limits for filing the initial report are also reasonable in light of the CPSC's need to protect the public as soon as possible from dangerous products and in light of the CPSC's power to seek a court order seizing products that pose imminent danger to the public. As the Court has said:

> In the absence of some contrary indication in the legislative history, the * * * regulation must

> be * * * upheld, particularly when it is to be remembered that safety legislation is to be liberally construed to effectuate the congressional purpose.

Whirlpool Corp., 445 U.S. at 13.

We conclude that a private party may maintain a cause of action under the Consumer Product Safety Act for alleged violation of the Consumer Product Safety Commission's substantial product hazard reporting regulations.

The decision of the Court of Appeals is affirmed.

COYNE, Justice, took no part in the consideration or decision of this case.

APPENDIX B

STATE OF MINNESOTA

IN COURT OF APPEALS

#C8-84-188
#CX-84-242

Douglas County

Popovich, Chief Judge

JANET SWENSON, individually and as trustee for the heirs at law and next of kin of Edward C. Swenson,

Respondent,

JOHN C. LERVICK
SWENSON, GROVER, LERVICK, SYVERSON & BATEY, LTD.
710 Broadway, P.O. Box 787
Alexandria, MN 56308

vs.

The EMERSON ELECTRIC CO., defendant and third party plaintiff,

Appellant,

DOUGLAS J. MUIRHEAD
MEAGHER, GEER, MARKHAM, ANDERSON, ADAMSON, FLASKAMP & BRENNAN
2250 IDS Center
Minneapolis, MN 55402

ROBERT M. SUSSMAN
COVINGTON & BURLING
1201 Pennsylvania Ave. N.W.
P.O. Box 7566
Washington, D.C. 20044

The A. O. SMITH CORPORATION, defendant and third party plaintiff,

Appellant,

THOMAS C. ATHENS
ARVESEN, DONOHO, LUNDEEN, HOFF, SVINGEN & ATHENS
125 South Mill Street
Fergus Falls, MN 56537

vs.

LAKE REGION COOPERATIVE,
third party defendant.

CHARLES R. KENNEDY
KENNEDY & NERVIG
503 Jefferson Street S.
Wadena, MN 56482

Minnesota Association of
Commerce and Industry
Amicus Curiae
WINSTON W. BORDEN
480 Cedar Street
St. Paul, MN 55101

Minnesota Trial Lawyers
Association
Amicus Curiae
CLINT GROSE
Midwest Plaza East Bldg.
Minneapolis, MN 55402

Endorsed
Filed October 2, 1984
Wayne Tschimperle, Clerk
Minnesota Appellate Courts

SYLLABUS

1. Violation of the substantial hazard reporting regulations of the Consumer Product Safety Act constitutes violation of a rule of the Consumer Product Safety Commission and authorizes a private action. 15 U.S.C.A. § 2072(a) (1982).

2. The substantial hazard reporting claim was timely filed since it arose out of the same transaction or occurrence as the claims in the original complaint. Minn. R. Civ. P. 15.03.

3. Punitive damages are not awardable in unintentional act death cases filed but undecided as of June 15, 1983.

Certified questions answered.

Heard, considered and decided by Popovich, Chief Judge, Leslie, Judge and Crippen, Judge.

OPINION

POPOVICH, Chief Judge

Plaintiff-respondent Janet Swenson, individually and as trustee for the heirs at law of Edward Swenson, commenced this wrongful death action against defendant-appellants A. O. Smith Company and Emerson Electric on April 6, 1981. Her claims arise from explosion of a water heater manufactured by appellant A. O. Smith which incorporated thermostatic gas controls manufactured by appellant Emerson Electric Company. Respondent's husband, Edward Swenson was severely burned in the explosion and died 11 days later.

On June 14, 1983, respondent moved for permission to file a second amended complaint adding a cause of action under the Consumer Product Safety Act, including a claim for punitive damages. Appellant Emerson Electric opposed the motion. On November 21, 1983, the Douglas County District Court issued an order granting respondent leave to file a second amended complaint.

On December 22, 1983, appellants moved to dismiss the Consumer Product Safety Act claim, for summary judgment on that claim, or for certification of the issues relevant to that claim. By order of January 13, 1984, the trial court denied appellants' motion to dismiss or for summary judgment but certified the questions as important and doubtful pursuant to Minn. R. Civ. App. P. 103.03(h).

Certified questions answered.

FACTS

The parties submit the following agreed statement of the record pursuant to Minn. R. Civ. App. P. 110.04:

> 1. Plaintiff avers that on September 21, 1979, an explosion occurred which caused the death of Plaintiff's decedent, Edward C. Swenson. Plaintiff avers that the explosion was caused by an accumulation of LP gas due to a defective water heater valve manufactured by Appellant.

2. Plaintiff commenced this litigation by service of process on April 14, 1981.

3. On June 6, 1983, Respondent brought a motion for leave to amend her Complaint to assert a cause of action against Appellant Emerson Electric for alleged violations of the Consumer Products Safety Act, and to amplify her allegations in support of a claim for punitive damages. Over Appellant Emerson Electric's objection, leave was granted to serve the Amended Complaint.

4. Count Five of Plaintiff's Second Amended Complaint seeks to recover damages based upon alleged violations of the Consumer Products Safety Act.

5. Immediately after service of Plaintiff's Second Amended Complaint pursuant to leave of the trial court, Appellant Emerson Electric Company noticed a motion to dismiss Count Five of Plaintiff's Second Amended Complaint for failure to state a claim upon which relief can be granted, or in the alternative for summary judgment dismissing Count Five of Plaintiff's Second Amended Complaint as time barred under the statute of limitations for wrongful death actions in the state of Minnesota. Appellant Emerson Electric further moved the Court for judgment dismissing Plaintiff's claims for punitive damages for failure to state a claim upon which relief can be granted. Each of the motions was denied by the trial court, but the court certified each of the issues raised to be important and doubtful in order to permit interlocutory review of those issues.

ADDITIONAL RECORD FACTS

On September 10, 1979, decedent Edward Swenson allegedly went to the basement of the family home to light the pilot light of the family's water heater. While he was in the basement, an explosion occurred. Edward was seriously burned and was taken to the Douglas County Hospital and then the Ramsey County Hospital Burn Unit. He died on September 21, 1979.

Respondent Janet Swenson is the surviving spouse of Edward Swenson. She was appointed Trustee for the couple's four minor children and commenced this wrongful death action on behalf of herself and the children on April 6, 1981. The complaint includes five counts: (1) negligent design, manufacture, construction, assembly, packaging and distribution; (2) negligent failure to provide reasonable warning of product defect and hazard; (3) breach of implied warranties of fitness and merchantability; (4) strict product liability; and (5) willful indifference to the rights and safety of others justifying an award of punitive damages. Respondent filed an amended complaint on March 17, 1982 by consent of the parties. The amended complaint did not alter the counts enumerated in the original complaint.

On June 14, 1983, respondent filed a motion for permission to file a second amended complaint. The trial court, over opposition, granted the motion pursuant to Minn. R. Civ. P. 15.01 by order dated November 21, 1983.

The second amended complaint alleges a violation of the Consumer Product Safety Act, 15 U.S.C.A. §§ 2051-2083 (1982). Specifically, the complaint alleges the water heater and gas control valve were defective and created a substantial product hazard as defined by the Act. Appellants' failure to timely and accurately report this substantial product hazard to the Consumer Product Safety Commission in violation of 15 U.S.C.A. § 2064(b) (1982) forms the basis of respondent's claim for costs, fees and punitive damages.

Appellants moved for dismissal or summary judgment on the Consumer Product Safety claim, asserting respondent had failed to state a cause of action within the private suit provision of the Act, 15 U.S.C.A. § 2072 (1982). In the alternative, appellants requested certification of questions involving this claim for interlocutory review. By its order of January 13, 1984, the trial court denied appellants' motion for dismissal or summary judgment but certified as important and doubtful three questions involving respondent's Consumer Product Liability Act claim.

ISSUES

Certified Questions

1. Does Section 23 of the Consumer Products Safety Act, 15 U.S.C. § 2072, provide a private right of action for violation of the non-binding interpretive regulation issued by the Consumer Products Safety Commission at 15[sic] CFR Part 1115?

2. Does the Section 23 claim asserted in plaintiff's second amended complaint arise out of the "same transaction or occurrence" that is the subject of plaintiff's original claims, within the meaning of Rule 15.03 of the Minnesota Rules of Civil Procedure, so that plaintiff's untimely filing of the CPSA claim is made timely by application of the Minnesota Relation-Back Doctrine?

3. Does subdivision 4 of Minnesota Statutes § 573.02, as amended by Chapter 347 of Laws of Minnesota for 1983, have retroactive application to wrongful death lawsuits which do not result from an intentional act constituting murder, so that plaintiff should be permitted to seek punitive damages in this case arising out of an occurrence in 1979?

ANALYSIS

1. The Consumer Product Safety Act (Act) authorizes a private cause of action under specified circumstances.

> Any person who shall sustain injury by reason of any knowing (including willful) violation of *a consumer product safety rule, or any other rule or order issued by the Commission* may sue any person who knowingly (including willfully) violated any such rule or order in any district court of the United States in the district in which the defendant resides or is found or has an agent * * *.

15 U.S.C.A. § 2072(a) (1982) (emphasis added).

Respondent's second amended complaint alleges violation of the Consumer Product Safety Act's substantial product hazard reporting requirements, 15 U.S.C.A. § 2064 (1982).

The Commission did not promulgate a consumer product safety rule relative to these reporting requirements. The Commission did, however, promulgate reporting requirement regulations. *See* 16 C.F.R. §§ 1115.1-.22 (1984). At issue is whether these regulations constitute another rule or order issued by the Commission within the meaning of 15 U.S.C. § 2072.

Appellants maintain the regulations are merely interpretive and thus are not a rule as contemplated by Congress in section 2072. In support of their claim, appellants cite the stated purpose of the regulations.

> The purpose of this Part 1115 is to set forth the Consumer Product Safety Commission's (Commission's) interpretation of the reporting requirements imposed on manufacturers (including importers), distributors, and retailers by section 15(b) of the Consumer Product Safety Act, as amended (CPSA) (15 U.S.C. 2064(b)) and to indicate the actions and sanctions which the Commission may require or impose to protect the public from substantial product hazards, as that term is defined in section 15(a) of the CPSA.

16 C.F.R. § 1115.1 (1984).

In *Morris v. Coleco Industries,* 587 F. Supp. 8 (E.D. Va. 1984), the court implicitly adopted appellants' position when it said: "the requirement to disclose is not a requirement based upon a rule or order of the Commission. It is a requirement predicated upon the statute itself." *Id.* at 9.

We disagree. Section 2072 creates a private cause of action for certain violations of "a consumer product safety rule, or any other rule * * * issued by the Commission." 15 U.S.C.A. § 2072. The wording of the statute is plain, simple and straightforward, and the words must therefore be accorded their normal meaning. *Young v. Robertshaw Controls Co.,* 560 F. Supp. 288, 292 (N.D.N.Y. 1983); *United States v. Advance Machine Co.,* 547 F. Supp. 1085, 1089 (D. Minn. 1982). Under the Administrative Procedure Act:

> "rule" means the whole or a part of an agency statement of general or particular applicability and

> future effect designed to implement, *interpret,* or prescribe law or policy or describing the organization, procedure or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing * * * *

5 U.S.C.A. § 551(4) (1977) (emphasis added).

Even if appellants' characterization of the cited regulations is correct, actions alleging violations of the regulations are cognizable under the plain language of section 2072. *Payne v. A.O. Smith Corp.,* 578 F. Supp. 733, 738 (S.D. Ohio 1983); *see also Young v. Robertshaw Controls Co.,* 560 F. Supp. at 292 (contention that violation of disclosure rule does not entitle plaintiff to maintain private action flies in the face of unambiguous language of § 2072).

> Within its realm of consumer products, the Commission has issued rules which, for purposes of this case, may broadly be classified into two major categories: 'consumer product safety rules' and administrative rules. The former is comprised of rules promulgated in order to halt or restrict the sale or manufacture of consumer products deemed unreasonably dangerous to the public. * * *
>
> The other major category of rules comprises regulations promulgated in order to facilitate the administration of the CPSC and its statutory duties. Of paramount importance to the efficient functioning of the CPSC is a subset of these administrative regulations comprising what might conveniently be referred to as disclosure rules. Thus Part 1115 of 16 C.F.R., headed 'Substantial Product Hazard Reports' is just such a disclosure provision, the purpose of which is to delineate the CPSC's 'interpretation of the reporting requirements imposed on manufacturers (including importers), distributors, and retailers by

> section 15(b) of . . . [CPSA, 15 U.S.C. § 2064(b)] and to indicate the actions and sanctions which the Commission may require or impose to protect the public from substantial product hazards, as that term is defined in section 15(a) of the CPSA.' 16 C.F.R. § 1115.1 This rule thus implements the statutory directive of 15 U.S.C. § 2064(b) * * *.

Butcher v. Robertshaw Controls Co., 550 F. Supp. 692, 695-96 (D. Md. 1981).

2. Respondent's claim under the Consumer Product Safety Act was filed after the statute of limitation period. If the claim relates back, it is timely; if it does not relate back, it is barred.

Rule 15.03 of the Minnesota Rules of Civil Procedure states:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

Id.

In *Heyn v. Braun*, 239 Minn. 496, 59 N.W.2d 326 (1953), the plaintiffs commenced an action to foreclose a mechanic's lien for labor and material furnished in the installation of an air conditioning unit. At the opening of trial, the court permitted plaintiff to amend the complaint by adding a claim for the fair and reasonable value of the improvements. Defendant contended the amendment pleaded a new cause of action. The Minnesota Supreme Court disagreed, stating:

> The federal courts in construing the identical rule (Federal Rule 15[c]) have held it applicable in situations involving prescription or statutes of limitation, if the amendment under consideration relates back to or expands or amplifies the cause set forth in the original complaint * * *.

Id. at 502, 59 N.W.2d at 330.

Respondent's original complaint does not claim a violation of the Consumer Product Safety Act or regulations. It does, however, claim negligent failure to provide reasonable warning of product defect and hazard and seeks punitive damages under state law. The negligent failure to provide claim is directly related to the alleged violation of the Act and corresponding regulation, namely the failure to report substantial product hazards. Thus, appellants had notice of the conduct asserted in the amendment. The amendment, therefore, relates back. *See Senger v. Soo Line Railroad Co.*, 493 F. Supp. 143, 145 (D. Minn. 1980).

3. In 1983, the Minnesota Legislature amended the wrongful death statute, Minn. Stat. § 573.02 (1982), to permit punitive damage awards. In enacting this amendment, the Legislature provided:

> Minnesota Statutes 1982, section 573.02, subdivision 4, is amended to read:
>
> Subd. 4. This section shall not apply to any death or cause of action arising prior to its enactment, nor to any action or proceeding now pending in any court of the state of Minnesota, except, notwithstanding section 645.21, this section shall apply to any death or cause of action arising prior to its enactment which resulted from an intentional act constituting murder, and to any such action or proceeding now pending in any court of the state of Minnesota with respect to issues on which a final judgment has not been entered.

1983 Minn. Laws ch. 347, § 3.

The meaning of the phrase "any such action or proceeding" is disputed. Respondents interpret the language to mean any wrongful death action. Appellants interpret the language in conjunction with the first clause of the sentence, limiting its application to deaths resulting from intentional acts constituting murder. We conclude that Minn. Stat. § 573.02, subd. 4 (Supp. 1983) does not retroactively apply to lawsuits not resulting from an intentional act constituting murder.

Minnesota laws are presumed to have no retroactive effect unless "clearly and manifestly" intended by the legislature. Minn. Stat. § 645.21 (1982); *see Mason v. Farmers Ins. Co.*, 281 N.W.2d 344, 348 (Minn. 1979). The first part of section 573.02, subd. 4 specificially excludes retroactive application of the statute. The ambiguous phrase in the latter part of subdivision 4 cannot reasonably be interpreted as "clearly and manifestly" negating this clear exclusion of retroactive application. Under respondent's interpretation, the exception swallows the rule. We do not believe this was the legislature's intent in adopting subdivision 4. *See* Minn. Stat. §§ 645.16, 645.17(1)-(2) (1982).

DECISION

Certified Question No. 1: Does Section 23 of the Consumer Products Safety Act, 15 U.S.C. § 2072, provide a private right of action for violation of the non-binding interpretive regulation issued by the Consumer Products Safety Commission at 15[sic] CFR Part 1115?

Answer: Violation of the substantial hazard reporting regulations of the Consumer Product Safety Act, 16 C.F.R. §§ 1115.1-.22 (1984) constitutes violation of a rule issued by the Consumer Product Safety Commission. Thus, an injured plaintiff or his representative is authorized to maintain a private cause of action for the violation under 15 U.S.C.A. § 2072(a) (1982).

Certified Question No. 2: Does the Section 23 claim asserted in plaintiff's second amended complaint arise out of the "same transaction or occurrence" that is the subject of plaintiff's original claims, within the meaning of Rule 15.03 of the Minnesota Rules of Civil Procedure, so that plaintiff's untimely filing of the CPSA claim is made timely by application of the Minnesota Relation-Back Doctrine?

Answer: The substantial hazard reporting regulation violation claimed in respondents' second amended complaint arose out of the same transaction or occurrence as the claims of the original complaint. Therefore, the amendment was timely under Minn. R. Civ. P. 15.03.

Certified Question No. 3: Does subdivision 4 of Minnesota Statutes § 573.02, as amended by Chapter 347 of Laws of Minnesota for 1983, have retroactive application to wrongful death lawsuits which do not result from an intentional act constituting murder, so that plaintiff should be permitted to seek punitive damages in this case arising out of an occurrence in 1979?

Answer: Minn. Stat. § 573.02, subd. 4 (Supp. 1983) does not retroactively apply to this action.

Certified questions answered.

PETER S. POPOVICH
Chief Judge
9-21-84

APPENDIX C

STATE OF MINNESOTA
COUNTY OF DOUGLAS

IN DISTRICT COURT
SEVENTH JUDICIAL DISTRICT

ORDER

JANET SWENSON, individually and as trustee
for the heirs at law and next of kin of
EDWARD C. SWENSON,
Plaintiff,

vs.

The EMERSON ELECTRIC COMPANY,
and the A.O. SMITH CORPORATION,
Defendants and
Third-Party Plaintiffs,

vs.

LAKE REGION CO-OPERATIVE,
a Minnesota corporation,
Third-Party Defendant.

The above-entitled matter came on for hearing on the 8th day of August, 1983, before the undersigned, in the Douglas County Courthouse, Alexandria, Minnesota, on the motion of the plaintiff for leave to file a second amended complaint.

John Lervick, Esquire, appeared on behalf of the plaintiff.

Douglas J. Muirhead, Esquire, and Robert Sussman, Esquire, appeared on behalf of Defendant Emerson Electric Company.

Thomas Athens, Esquire, appeared on behalf of Defendant. A.O. Smith Corporation.

Charles W. Kennedy, Esquire, appeared on behalf of Third-Party Defendant Lake Region Co-operative.

The Court having heard and considered the arguments and memorandums of counsel, and on all the files and records herein, now makes the following Order:

IT IS ORDERED that pursuant to Rule 15.01 of the Minnesota Rules of Civil Procedure, the plaintiff is granted leave to file the second amended complaint, a copy of which was attached to her motion.

Dated this 21st day of November, 1983.

s/ DONALD A. GRAY
DONALD A. GRAY
Judge of District Court

MEMORANDUM

On September 10, 1979, Edward C. Swenson, decedent, sustained fatal injuries in an explosion of a water heater designed, manufactured and distributed by Defendant A. O. Smith, Corporation. Plaintiff brings this wrongful death action alleging that the gas control valve on the heater, manufactured by Defendant Emerson Electric Company, was defective and the cause of the explosion. The causes of action alleged in the original complaint were predicated on negligence, strict liability tort, breach of warranty and fraud.

The plaintiff now moves to amend her complaint to allege another cause of action for recovery based on the allegation that the defendants violated the Consumer Products Safety Act. The amended complaint also clarifies the allegations of Count IV, paragraph 23 of the original complaint.

The defendants oppose plaintiff's motion to amend on the following grounds:

1. The proferred amendments have been unreasonably and unjustifiably delayed.

2. The claim is barred by a Statute of Limitations.

3. The additional count does not state a cause of action.

The defendants do not oppose the amendment that clarifies the allegations of Count IV, paragraph 23 of the original complaint.

Unjustified Delay

Rule 15.01 of the Rules of Civil Procedure specifically provides that the leave to amend a party's pleadings shall be freely given when justice so requires.

The fatal injury to Edward C. Swenson occurred on September 10, 1979. This lawsuit was commenced in April of 1981. The motion to amend the complaint to assert a violation of the Consumer Products Safety Act (CPSA) was made on

August 8, 1983, which cause of action was based on the authority of two U.S. District Court cases decided in 1981 and in 1983, both involving Robertshaw Controls Company, wherein the right of a private party to maintain a civil action under the CPSA was first recognized. Discovery is ongoing in this case, although no depositions have been taken to date. The prejudice to the plaintiff in denying her the right to assert an additional theory of recovery would greatly outweigh any hardship or inconvenience to the defendants in preparing a defense to meet this newly asserted claim.

Statute of Limitations

The defendants correctly assert that the motion to amend should be denied if the amended complaint could not withstand a motion to dismiss, and that a motion to dismiss this count should be granted on the ground that the claim is barred by the Statute of Limitations. That issue, therefore, shall be resolved in these proceedings without the necessity of making a separate motion to dismiss.

Count V of the proposed second amended complaint alleges a cause of action under Section 23 of the Consumer Products Safety Act (CPSA). Section 23(a) provides in pertinent part:

> "Any person who shall sustain injury by reason of any knowing (including willful) violation of a consumer product safety rule, or any other rule or order issued by the Commission may sue any person who knowingly (including willfully) violated any such rule or order in any district court of the United States ... (and may) recover damages sustained ..." 15 U.S.C. § 2072(a).

The CPSA, under which plaintiff seeks to assert her additional theory of recovery, does not state a limitations period for private damage actions. Where Congress has not provided a limitations period for a federal claim, courts must look to the law of the forum state and apply the Statute of Limitations for analogous causes of action, pursuant to the Rules of Decisions

Act, 28 U.S.C. § 1652. *Holmberg* v. *Armbrecht,* 327 U.S. 392, 395 (1946); *Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185, 210 n.29 (1976).

Here, the Statute of Limitations applicable to plaintiff's CPSA claim is the Minnesota Statute of Limitations for personal injury actions. Section 573.02, Subd 1 of the Minnesota Statutes Annotated (West 1983) requires that an action "resulting in personal injury" must be brought within 3 years of the injury.

The present motion is made 3 years and 9 months after the injury occurred. However, the claim is not barred if it is found to "relate back" to the date of the original complaint.

Rule 15.03 of the Minnesota Rules of Civil Procedure (West [sic] provides in pertinent part:

> "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment *relates back* to the date of the original pleading. . . ."

The application of Rule 15.03 has been commented on in Hetlar and Adamson *Minnesota Practice,* Vol. 1 at 540

> ". . . Rule 15.03 provides that the relation back occurs automatically if the new claim arose out of the original conduct transaction or occurrence. Facts logically related to the factual basis for the original claim should determine if the new claim arises out of the same conduct transaction or occurrence. The new claim may change the theory of recovery or may assert an entirely new claim if it arises out of the events giving rise to the original claim . . ." Cases cited.

The defendants assert that the "conduct, transaction or occurrence" alleged in relation to the CPSA claim is the course of dealing between the defendants and the CPSA rather than the explosion of September 10, 1979, asserted by the plaintiff. The defendants further assert that the CPSA claim, therefore,

having arisen out of a separate transaction cannot relate back to the explosion and is barred by the Statute of Limitations.

In considering the nature of the action brought by the plaintiff, this Court finds that the amended pleading does relate back to the explosion and is, therefore, not barred by the Statute.

This is an action to recover damages for injuries caused by the explosion of September 10, 1979. The plaintiff in Count V alleges that the injuries were caused by the defendant's violation of a rule or order issued by the Commission under the CPSA. Specifically the plaintiff alleges that the defendants failed to disclose to the Consumer Products Safety Commission complaints that they received that their water heaters and gas controls were defective and created a substantial product hazard.

The Consumer Products Safety Act of 1972 was passed, in part, to "protect the public against unreasonable risk of injury associated with consumer products." The requirement that a manufacturer disclose the existence in their products of a defect that creates a substantial product hazard is to permit the Commission to institute effective measures to protect the public against injury.

Upon proof of a violation of the CPSA, and that the violation was a cause of fatal injuries sustained by the decedent, the plaintiff is entitled to recover compensatory damages. Count V, therefore, seeks to recover reasonable attorney's fees and expert witness cost. Count V and VI also seek punitive damages. Although the claim for the recovery of attorney's fees and costs and punitive damages are a new claim, they arise out of the explosion, which was the event that gave rise to the original claim. Chapter 347 of the Laws of Minnesota (1983), amending Minnesota Statute 573.01, section 2, permits the recovery of punitive damages in wrongful death actions.

Cause of Action

The defendants oppose the motion for leave to amend the complaint on the grounds that the proferred Count V would not

withstand a motion to dismiss for failure to state a cause of action, in that there is no private cause of action for a violation of the CPSA. In Count V of the second amended complaint, the plaintiff alleges that defendants failed to comply with the reporting requirements of 15 USC § 2064(b). The defendants assert that since this is a statutory violation and not a violation of any "rule or order", only the Commission has authority to impose sanctions.

The U.S. District Court, E.D. New York, when confronted with a similar argument said:

> "the Commission's regulations found at 16 CFR Part 1115 interpret and impliment this statutory provision and reiterate the manufactures duty of disclosure." *Young* vs. *Robertshaw Controls Company,* 560 Fed Supp 288 187.

This Court has not been persuaded to hold otherwise.

D.A.G.

APPENDIX D

STATE OF MINNESOTA
SUPREME COURT

JUDGMENT

C8-84-188
Appellate Court Case Number

16463
Trial Court Case Number

JANET SWENSON, individually and as
trustee for the heirs at law and
next of kin of Edward C. Swenson,
Respondent,

vs.

The EMERSON ELECTRIC COMPANY,
defendant and third party plaintiff, petitioner,
Appellant,

The A.O. SMITH CORPORATION,
defendant and third party plaintiff,
Appellant,

vs.

LAKE REGION COOPERATIVE,
third party defendant,
Respondent.

Pursuant to an order of the Court heretofore duly made and entered in this cause it is determined and adjudged that the order of the Court below, herein appealed from, to wit, of the District Court within and for the County of Douglas be and the same hereby is affirmed and that judgment be entered accordingly. A certified copy of the entry of judgment is herein transmitted and made part of the remittitur.

Dated and signed: FOR THE COURT

Dated: January 2, 1986

Attest: WAYNE TSCHIMPERLE
Clerk of the Appellate Courts

By: JULIE A. KURTH
Assistant Clerk

APPENDIX E

15 U.S.C. § 2064:

§ 2064. Substantial product hazards

(a) Definition. For purposes of this section, the term "substantial product hazard" means—

(1) a failure to comply with an applicable consumer product safety rule which creates a substantial risk of injury to the public, or

(2) a product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise) creates a substantial risk of injury to the public.

(b) Noncompliance with applicable consumer product safety rules; product defects; notice to Commission by manufacturer, distributor, or retailer. Every manufacturer of a consumer product distributed in commerce, and every distributor and retailer of such product, who obtains information which reasonably supports the conclusion that such product—

(1) fails to comply with an applicable consumer product safety rule; or

(2) contains a defect which could create a substantial product hazard described in subsection (a)(2).

shall immediately inform the Commission of such failure to comply or of such defect, unless such manufacturer, distributor, or retailer has actual knowledge that the Commission has been adequately informed of such defect or failure to comply.

(c) Public notice of defect or failure to comply; mail notice. If the Commission determines (after affording interested persons, including consumers and consumer organizations, an opportunity for a hearing in accordance with subsection (f) of this section) that a product distributed in commerce presents a substantial product hazard and that notification is required in order to adequately protect the public from such

substantial product hazard, the Commission may order the manufacturer or any distributor or retailer of the product to take any one or more of the following actions:

(1) To give public notice of the defect or failure to comply.

(2) To mail notice to each person who is a manufacturer, distributor, or retailer of such product.

(3) To mail notice to every person to whom the person required to give notice knows such product was delivered or sold.

Any such order shall specify the form and content of any notice required to be given under such order.

(d) Repair; replacement; refunds; action plan. If the Commission determines (after affording interested parties, including consumers and consumer organizations, an opportunity for a hearing in accordance with subsection (f)) that a product distributed in commerce presents a substantial product hazard and that action under this subsection is in the public interest, it may order the manufacturer or any distributor or retailer of such product to take whichever of the following actions the person to whom the order is directed elects:

(1) To bring such product into conformity with the requirements of the applicable consumer product safety rule or to repair the defect in such product.

(2) To replace such product with a like or equivalent product which complies with the applicable consumer product safety rule or which does not contain the defect.

(3) To refund the purchase price of such product (less a reasonable allowance for use, if such product has been in the possession of a consumer for one year or more (A) at the time of public notice under subsection (c), or (B) at the time the consumer receives actual notice of the defect or noncompliance, whichever first occurs).

An order under this subsection may also require the person to whom it applies to submit a plan, satisfactory to the

Commission, for taking action under whichever of the preceding paragraphs of this subsection under which such person has elected to act. The Commission shall specify in the order the persons to whom refunds must be made if the person to whom the order is directed elects to take the action described in paragraph (3). If an order under this subsection is directed to more than one person, the Commission shall specify which person has the election under this subsection. An order under this subsection may prohibit the person to whom it applies from manufacturing for sale, offering for sale, distributing in commerce, or importing into the customs territory of the United States (as defined in general headnote 2 to the Tariff Schedules of the United States [19 USCS § 1202]), or from doing any combination of such actions, the product with respect to which the order was issued.

(e) Reimbursement. (1) No charge shall be made to any person (other than a manufacturer, distributor, or retailer) who avails himself of any remedy provided under an order issued under subsection (d), and the person subject to the order shall reimburse each person (other than a manufacturer, distributor, or retailer) who is entitled to such a remedy for any reasonable and foreseeable expenses incurred by such person in availing himself of such remedy.

(2) An order issued under subsection (c) or (d) with respect to a product may require any person who is a manufacturer, distributor, or retailer of the product to reimburse any other person who is a manufacturer, distributor, or retailer of such product for such other person's expenses in connection with carrying out the order, if the Commission determines such reimbursement to be in the public interest.

(f) Hearing. An order under subsection (c) or (d) may be issued only after an opportunity for a hearing in accordance with section 554 of title 5, United States Code [5 USCS § 554], except that, if the Commission determines that any person who wishes to participate in such hearing is a part of a class of participants who share an identity of interest, the Commission may limit such person's participation in such hearing to participation through a single representative designated by such class

(or by the Commission if such class fails to designate such a representative).

(g) Preliminary injunction. (1) If the Commission has initiated a proceeding under this section for the issuance of an order under subsection (d) with respect to a product which the Commission has reason to believe presents a substantial product hazard, the Commission (without regard to section 27(b)(7) [15 USCS § 2076(b)(7)]) or the Attorney General may, in accordance with section 12(c)(1) [15 USCS § 2061(c)(1)], apply to a district court of the United States for the issuance of a preliminary injunction to restrain the distribution in commerce of such product pending the completion of such proceeding. If such a preliminary injunction has been issued, the Commission (or the Attorney General if the preliminary injunction was issued upon an application of the Attorney General) may apply to the issuing court for extensions of such preliminary injunction.

(2) Any preliminary injunction, and any extension of a preliminary injunction, issued under this subsection with respect to a product shall be in effect for such period as the issuing court prescribes not to exceed a period which extends beyond the thirtieth day from the date of the issuance of the preliminary injunction (or, in the case of a preliminary injunction which has been extended, the date of its extension) or the date of the completion or termination of the proceeding under this section respecting such product, whichever date occurs first.

(3) The amount in controversy requirement of section 1331 of title 28, United States Code [28 USCS § 1331], does not apply with respect to the jurisdiction of a district court of the United States to issue or exend [extend] a preliminary injunction under this subsection.

(Oct. 27, 1972, P. L. 92-573, § 15, 86 Stat. 1221; May 11, 1976, P. L. 94-284, § 12(a), 90 Stat. 508; Aug. 13, 1981, P. L. 97-35, Title XII, Subtitle A, § 1211(h)(4), 95 Stat. 723.)

15 U.S.C. § 2072:

§ 2072. Suits for damages

(a) Persons injured; costs; amount in controversy. Any person who shall sustain injury by reason of any knowing

(including willful) violation of a consumer product safety rule, or any other rule or order issued by the Commission may sue any person who knowingly (including willfully) violated any such rule or order in any district court of the United States in the district in which the defendant resides or is found or has an agent, shall recover damages sustained, and may, if the court determines it to be in the interest of justice, recover the costs of suit, including reasonable attorneys' fees (determined in accordance with section 11(f) [15 USCS § 2060(f)]) and reasonable expert witnesses' fees; Provided, That the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, unless such action is brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

(b) Denial and imposition of costs. Except when express provision is made in a statute of the United States, in any case in which the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) Remedies available. The remedies provided for in this section shall be in addition to and not in lieu of any other remedies provided by common law or under Federal or State law.

(Oct. 27, 1972, P. L. 92-573, § 23, 86 Stat. 1226; May 11, 1976, P. L. 94-284, § 10(c), 90 Stat. 507; Dec. 1, 1980, P. L. 96-486, § 3, 94 Stat. 2369; Aug. 13, 1981, P. L. 97-35, Title XII, § 1211(h)(3)(B), 95 Stat. 723.)

APPENDIX F

Title 16—Commercial Practice

CHAPTER II—CONSUMER PRODUCT SAFETY COMMISSION

SUBCHAPTER B—CONSUMER PRODUCT SAFETY ACT REGULATIONS

PART 1115—SUBSTANTIAL PRODUCT HAZARD REPORTS

* * *

Interpretation, Policy, and Procedure for Substantial Product Hazards

AGENCY: Consumer Product Safety Commission.

ACTION: Statement of interpretation, policy, and procedure.

SUMMARY: In this document the Consumer Product Safety Commission sets forth its interpretation of the reporting requirement in section 15(b) of the Consumer Product Safety Act. Section 15(b) requires every manufacturer, distributor, and retailer of a consumer product who obtains information which reasonably supports the conclusion that the product either fails to comply with an applicable consumer product safety rule or contains a defect which could create a substantial product hazard immediately to inform the Commission, unless the manufacturer, distributor, or retailer has actual knowledge that the Commission is adequately informed of such failure to conform or of such defect. The Commission has also outlined its policy and procedure regarding remedial action and sanctions relating to the treatment of substantial product hazards and reports under section 15.

This regulation replaces and consolidates the Commission's existing policies and procedures for substantial product hazards. The purpose of this rule is to assist those subject to section 15(b) by clearly setting forth the Commission's interpretation, policy, and procedure regarding that section and by informing them of possible remedies and sanctions.

EFFECTIVE DATE: August 7, 1978.

FOR FURTHER INFORMATION CONTACT:

Eric L. Stone, Product Defect Correction Division, Compliance and Enforcement, Consumer Product Safety Commission, 5401 Westbard Avenue, Washington, D.C. 20207, telephone 301-492-6608.

* * *

DISCUSSION OF COMMENTS

* * *

D. SUBSTANTIVE OR INTERPRETIVE RULE

1. The written comments in response to the September publication of proposed Part 1115 indicated that the proposed rule was confusing as to its intended effect. The stated purpose of the rule is to "interpret" section 15 of the CPSA and to set forth the Commission's policy and procedure in enforcing this interpretation. Yet, as the commenters pointed out, the rule also stated that remedial actions would be taken and sanctions sought for violations "of this Part." These commenters said that such comments indicated that the rule was substantive in effect.

The confusion in the proposed rule has been eliminated. The Commission considered the difference between promulgating the rule as substantive or interpretive, sought public comment on the issue at the public hearings in April and May of 1978, and has decided to promulgate the rule as interpretive.

A substantive rule has the force and effect of law. Thus, a violation of a substantive rule issued under the CPSA is equivalent to a violation of the CPSA. In contrast, an interpretive rule offers guidance as to what a law means, but

does not itself have the force and effect of law. A violation of an interpretive rule is not necessarily a violation of law; the failure to comply with an interpretive rule *is* a violation of the law under which it is issued only if the rule reasonably interprets that law. In issuing these rules under section 15 of the CPSA, the Commission believes it has reasonably interpreted the provisions and obligations of that section. However, a firm charged with violating section 15 through acts which are contrary to these rules will always have an opportunity to urge the reasonableness of its actions under the circumstances, thereby defeating the accusation.

The Commission agrees with the consumer commenters who stated that the Commission could address the issues of its authority and the desirability of issuing a substantive regulation at a later date. They indicated that an interpretive regulation will serve a dual purpose: It will put subject firms fairly on notice of the Commission's view of the law, and it will give the Commission an opportunity to assess the reasonableness and effectiveness of this rule. The Commission agrees and is, therefore, issuing this rule as an interpretation of section 15.

2. Several commenters were unsure as to when civil and/or criminal penalties might be or could be assessed for failure to comply with section 15(b) of the CPSA.

Section 20 of the CPSA allows the Commission to obtain civil penalties against any person who knowingly fails to furnish information required by section 15(b) or who knowingly fails to comply with an order issued under section 15(c) or (d). Section 21 of the CPSA allows the Commission to obtain criminal penalties against any person who knowingly and willfully violates section 15 (b), (c), or (d) after having recieved [sic] notice of noncompliance from the Commission. The Commission's interpretation of section 15, embodied in this rule, will guide it in determining which actions to pursue and sanctions to seek as well as which persons to name as defendants. This interpretive rule should also guide subject firms and their officers in discharging their responsibilities under section 15.

* * *

PART 1115—SUBSTANTIAL PRODUCT HAZARD REPORTS

Subpart A—General Interpretation

Sec.
1115.1 Purpose.
1115.2 Scope and finding.
1115.3 Definitions.
1115.4 Defect.
1115.5—1115.9 [Reserved]
1115.10 Persons who must report and where to report.
1115.11 Imputed knowledge.
1115.12 Information which should be reported; evaluating substantial product hazard.
1115.13 Content and form of reports; delegations of authority.
1115.14 Time computations.
1115.15 Confidentiality and disclosure of data.

Subpart B—Remedial Actions and Sanctions

1115.20 Voluntary remedial actions.
1115.21 Compulsory remedial actions.
1115.22 Prohibited acts and sanctions.

AUTHORITY: Secs. 12, 15, 16, 17(a), 19, 20, 21, 22, 24, 27, 30 of Pub. L 92-573, as amended by Pub. L. 94-284; 86 Stat. 1218, 1221-1227, 1231, as amended, 90 Stat. 508-510 (15 U.S.C. 2061, 2064, 2065, 2066(a), 2068, 2069, 2070, 2071, 2073, 2076, 2079), unless otherwise noted.

Subpart A—General Interpretation

§ 1115.1 Purpose.

The purpose of this Part 1115 is to set forth the Consumer Product Safety Commission's (Commission's) interpretation of the reporting requirements imposed on manufacturers (including importers), distributors, and retailers by section 15(b) of the Consumer Product Safety Act, as amended (CPSA) (15 U.S.C. 2064(b)) and to indicate the actions and sanctions which the Commission may require or impose to protect the public from substantial product hazards, as that term is defined in section 15(a) of the CPSA.

§ 1115.2 Scope and finding.

(a) Section 15(a) of the CPSA (15 U.S.C. 2064(a)) defines "substantial product hazard" as either (1) a failure to comply with an applicable consumer product safety rule, which failure creates a substantial risk of injury to the public, or (2) a product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise) creates a substantial risk of injury to the public.

(b) Section 15(b) of the CPSA requires every manufacturer (including an importer), distributor, or retailer of a consumer product distributed in commerce who obtains information which reasonably supports the conclusion that the product either fails to comply with an applicable consumer product safety rule or contains a defect which could create a substantial product hazard immediately to inform the Commission, unless the manufacturer (including an importer), distributor, or retailer has actual knowledge that the Commission has been adequately informed. This provision indicates that a broad spectrum of safety-related information should be reported under section 15(b) of the CPSA.

(c) Sections 15(c) and 15(d) of the CPSA (15 U.S.C. 2064 (c) and (d)) empower the Commission to order a manufacturer (including an importer), distributor, or retailer of a consumer product distributed in commerce that presents a substantial product hazard to give various forms of notice to the public of the defect or the failure to comply and/or to order the subject firm to elect either to repair, to replace, or to refund the purchase price of such product. However, information which should be reported under section 15(b) of the CPSA does not automatically indicate the presence of a substantial product hazard since what must be reported are failures to comply with consumer product safety rules and defects that could create a substantial product hazard. (See § 1115.12.)

(d) The provisions of this Part 1115 deal with all consumer products (including imports) subject to regulation under the Consumer Product Safety Act, as amended (15 U.S.C.

2051-2081) (CPSA), and the Refrigerator Safety Act (15 U.S.C. 1211-1214) (RSA). In addition, the Commission has found that risks of injury to the public from consumer products subject to regulation under the Flammable Fabrics Act (15 U.S.C. 1191-1204) (FFA), the Federal Hazardous Substances Act (15 U.S.C. 1261-1274) (FHSA), and the Poison Prevention Packaging Act of 1970 (15 U.S.C. 1471-1476) (PPPA) cannot be eliminated or reduced to a sufficient extent in a timely fashion under those acts. Therefore; pursuant to secton 30(d) of the CPSA (15 U.S.C. 2079(d)), manufacturers (including importers), distributors, and retailers of consumer products which are subject to regulation under provisions of the FFA, FHSA, and PPPA must comply with the reporting requirements of section 15(b).

§ 1115.3 Definitions.

In addition to the definitions given in section 3 of the CPSA (15 U.S.C. 2052), the following definitions apply:

(a) "Adequately informed" under section 15(b) of the CPSA means that the Commission staff has received the information requested under §§ 1115.12 and/or 1115.13 of this part insofar as it is reasonably available and applicable or that the staff has informed the subject firm that the staff is adequately informed.

(b) "Commission meeting" means the joint deliberations of at least a majority of the Commission where such deliberations determine or result in the conduct or disposition of official Commission business. This term is synonymous with "Commission meeting" as defined in the Commission's regulation issued under the Government in the Sunshine Act, 16 CFR Part 1012.

(c) "Noncompliance" means the failure of a consumer product to comply with an applicable consumer product safety rule issued under the CPSA.

(d) A "person" means a corporation, company, association, firm, partnership, society, joint stock company, or individual.

(e) "Staff" means the staff of the Consumer Product Safety Commission unless otherwise stated.

(f) "Subject firm" means any manufacturer (including an importer), distributor, or retailer of a consumer product.

§ 1115.4 Defect.

Section 15(b)(2) of the CPSA requires every manufacturer (including an importer), distributor, and retailer of a consumer product who obtains information which reasonably supports the conclusion that the product contains a defect which could create a substantial product hazard to inform the Commission of such defect. Thus, whether the information available reasonably suggests a defect is the first determination which a subject firm must make in deciding whether it has obtained information which must be reported to the Commission. In determining whether it has obtained information which reasonably supports the conclusion that its consumer product contains a defect, a subject firm may be guided by the criteria the Commission and staff use in determining whether a defect exists. At a minimum, defect includes the dictionary or commonly accepted meaning of the word. Thus, a defect is a fault, flaw, or irregularity that causes weakness, failure, or inadequacy in form or function. A defect, for example, may be the result of a manufacturing or production error; that is, the consumer product as manufactured is not in the form intended by, or fails to perform in accordance with, its design. In addition, the design of and the materials used in a consumer product may also result in a defect. Thus, a product may contain a defect even if the product is manufactured exactly in accordance with its design and specifications, if the design presents a risk of injury to the public. A design defect may also be present if the risk of injury occurs as a result of the operation or use of the product or the failure of the product to operate as intended. A defect can also occur in a product's contents, construction, finish, packaging, warnings, and/or instructions. With respect to instructions, a consumer product may contain a defect if the instructions for assembly or use could allow the product, otherwise safely designed and manufactured, to present a risk of injury. To assist subject firms in understanding

the concept of defect as used in the CPSA, the following examples are offered:

(a) An electric appliance presents a shock hazard because, through a manufacturing error, its casing can be electrically charged by full-line voltage. This product contains a defect as a result of manufacturing or production error.

(b) Shoes labeled and marketed for long-distance running are so designed that they might cause or contribute to the causing of muscle or tendon injury if used for long-distance running. The shoes are defective due to the labeling and marketing.

(c) A kite made of electrically conductive material presents a risk of electrocution if it is long enough to become entangled in power lines and be within reach from the ground. The electrically conductive material contributes both to the beauty of the kite and the hazard it presents. The kite contains a design defect.

(d) A power tool is not accompanied by adequate instructions and safety warnings. Reasonably foreseeable consumer use or misuse, based in part on the lack of adequate instructions and safety warnings, could result in injury. Although there are no reports of injury, the product contains a defect because of the inadequate warnings and instructions.

(e) An exhaust fan for home garages is advertised as activating when carbon monoxide fumes reach a dangerous level but does not exhaust when fumes have reached the dangerous level. Although the cause of the failure to exhaust is not known, the exhaust fan is defective because users rely on the fan to remove the fumes and the fan does not do so.

However, not all products which present a risk of injury are defective. For example, a knife has a sharp blade and is capable of seriously injuring someone. This very sharpness, however, is necessary if the knife is to function adequately. The knife does not contain a defect insofar as the sharpness of its blade is concerned, despite its potential for causing injury,

because the risk of injury is outweighed by the usefulness of the product which is made possible by the same aspect which presents the risk of injury. In determining whether the risk of injury associated with a product is the type of risk which will render the product defective, the Commission and staff will consider, as appropriate: The utility of the product involved; the nature of the risk of injury which the product presents; the necessity for the product; the population exposed to the product and its risk of injury; the Commission's own experience and expertise; the case law interpreting Federal and State public health and safety statutes; the case law in the area of products liability; and other factors relevant to the determination. If the information available to a subject firm does not reasonably support the conclusion that a defect exists, the subject firm need not report. However, if the information does reasonably support the conclusion that a defect exists, the subject firm must then consider whether that defect could create a substantial product hazard. (See § 1115.12(f) for factors to be assessed in determining whether a substantial product hazard could exist.) If the subject firm determines that the defect could create a substantial product hazard, the subject firm must report to the Commission. Most defects could present a substantial product hazard if the public is exposed to significant numbers of defective products or if the possible injury is serious or is likely to occur. Since the extent of public exposure and/or the likelihood or seriousness of injury are ordinarily not known at the time a defect first manifests itself, subject firms are urged to report if in doubt as to whether a defect could present a substantial product hazard. On a case-by-case basis the Commission and the staff will determine whether a defect within the meaning of section 15 of the CPSA does, in fact, exist and whether that defect presents a substantial product hazard. Since a consumer product may be defective even if it is designed, manufactured, and marketed exactly as intended by a subject firm, subject firms should report if in doubt as to whether a defect exists. Defect, as discussed in this section and as used by the Commission and staff, pertains only to interpreting and enforcing the Consumer Product Safety Act. The criteria and discussion in this section are not intended to apply to any other area of the law.

§§ 1115.5—1115.9 [Reserved]

§ 1115.10 Persons who must report and where to report.

(a) Every manufacturer (including importer), distributor, or retailer of a consumer product that has been distributed in commerce who obtains information that such consumer product contains a defect which could create a substantial risk of injury to the public shall immediately notify the Product Defect Correction Division, Consumer Product Safety Commission, Washington, D.C. 20207 (telephone: 301-492-6608), or such other persons as may be designated. Manufacturers (including importers), distributors, and retailers of consumer products subject to regulation by the Commission under provisions of the FFA, FHSA, PPPA, as well as consumer products subject to regulation under the CPSA and RSA, must comply with this requirement.

(b) Every manufacturer (including importer), distributor, or retailer of a consumer product that has been distributed in commerce who obtains information that such consumer product fails to comply with an applicable consumer product safety standard or ban issued under the CPSA shall immediately notify the Commission's Product Defect Correction Division or such other persons as may be designated. A subject firm need not report a failure to comply with a standard or regulation issued under the provisions of the RSA, FFA, FHSA, or PPPA unless it can be reasonably concluded that the failure to comply results in a defect which could create a substantial product hazard. (See paragraph (a) of this section.)

(c) A distributor or retailer of a consumer product (who is neither a manufacturer nor an importer of that product) is subject to the reporting requirements of section 15(b) of the CPSA but may satisfy them by following the procedure detailed in § 1115.13(b).

(d) A manufacturer (including an importer), distributor, or retailer need not inform the Commission under section 15(b) of the CPSA if that person has actual knowledge that the Commission has been adequately informed of the defect or failure to comply. (See section 15(b) of the CPSA.)

§ 1115.11 Imputed knowledge.

(a) In evaluating whether or when a subject firm should have reported, the Commission will deem a subject firm to have obtained reportable information when the information has been received by an official or employee who may reasonably be expected to be capable of appreciating the significance of the information. (See § 1115.14(b)).

(b) In evaluating whether or when a subject firm should have reported, the Commission will deem a subject firm to know what a reasonable person acting in the circumstances in which the firm finds itself would know. Thus, the subject firm shall be deemed to know what it would have known if it had exercised due care to ascertain the truth of complaints or other representations. This includes the knowledge a firm would have if it conducted a reasonably expeditious investigation in order to evaluate the reportability of a death or grievous bodily injury or other information. (See § 1115.14.)

§ 1115.12 Information which should be reported; evaluating substantial product hazard.

(a) *General.* Subject firms should not delay reporting in order to determine to a certainty the existence of a noncompliance or a defect and the substantiality of a possible hazard. The obligation to report arises upon receipt of information from which one could reasonably conclude the existence of a noncompliance or of a defect which could create a substantial product hazard. Thus an obligation to report may arise when a subject firm receives the first information regarding a potential hazard or noncompliance. (See § 1115.14(c)). A subject firm in its report to the Commission need not admit or may specifically deny that the information it submits reasonably supports the conclusion that its consumer product is noncomplying or contains a "defect" which could create a substantial product hazard within the meaning of section 15(b) of the CPSA. After receiving the report, the staff will preliminarily determine whether the noncompliance or defect presents a substantial product hazard. This determination can be based on information supplied by a subject firm or from any other source. If the matter is adjudicated, the Commission will ultimately make the decision as to substantial product hazard or

will seek to have a court make the decision as to imminent product hazard.

(b) *Failure to comply.* Information indicating that a consumer product fails to comply with an applicable consumer product safety standard or ban issued under the CPSA must be reported.

(c) *Death or grievous bodily injury.* Information indicating that a noncompliance or a defect in a consumer product has caused, may have caused, or contributed to the causing, or could cause or contribute to the causing of a death or grievous bodily injury (e.g., mutilation, amputation/dismemberment, disfigurement, loss of important bodily functions, debilitating internal disorders, severe burns, severe electrical shocks, and injuries likely to require extended hospitalization) must be reported, unless the subject firm has investigated and determined that the information is not reportable.

(d) *Other information indicating a defect or noncompliance.* Even if there are no reports of a potential for or an actual death or grievous bodily injury, other information may indicate a reportable defect or noncompliance. In evaluating whether or when a subject firm should have reported, the Commission will deem a subject firm to know what a reasonable and prudent manufacturer (including an importer), distributor, or retailer would know. (See § 1115.11.)

(e) *Information which should be studied and evaluated.* The following are examples of information which a subject firm should study and evaluate in order to determine whether it is obligated to report under section 15(b) of the CPSA:

(1) Information about engineering, quality control, or production data suggesting the existence of a noncompliance or of a defect which could create a substantial product hazard.

(2) Information about safety-related production or design change(s) suggesting the existence of a noncompliance or of a defect which could create a substantial product hazard.

(3) Product liability suit(s) suggesting the existence of a noncompliance or of a defect which could create a substantial product hazard.

(4) Information from an independent testing laboratory suggesting the existence of a noncompliance or of a defect which could create a substantial product hazard.

(5) Complaint(s) from a consumer or consumer group indicating the existence of a noncompliance or of a defect which could create a substantial product hazard.

(6) Information received from the Commission or another governmental agency indicating the existence of a noncompliance or of a defect which could create a substantial product hazard.

(7) Information received from other firms, including requests to return a product or for replacement or credit, indicating the existence of a noncompliance or of a defect which could create a substantial product hazard. This includes both requests made by distributors and retailers to the manufacturer and requests from the manufacturer that products be returned.

(f) *Evaluating substantial risk of injury.* Information which should be or has been reported under section 15(b) of the CPSA does not automatically indicate the presence of a substantial product hazard. On a case-by-case basis the Commission and the staff will determine whether a defect or noncompliance exists and whether it results in a substantial risk of injury to the public. In deciding whether to report, subject firms may be guided by the following criteria the staff and the Commission use in determining whether a substantial product hazard exists:

(1) *Hazard created by defect.* Section 15(a)(2) of the CPSA lists factors to be considered in determining whether a defect creates a substantial risk of injury. These factors are set forth in the disjunctive. Therefore, the existence of any one of the factors could create a substantial product hazard. The Commission and the staff will consider some or all of the following factors, as appropriate, in determining the substantiality of a hazard created by a product defect:

(i) *Pattern of defect.* The Commission and the staff will consider whether the defect arises from the

design, composition, contents, construction, finish, packaging, warnings, or instructions of the product or from some other cause and will consider the conditions under which the defect manifests itself.

(ii) *Number of defective products distributed in commerce.* Even one defective product can present a substantial risk of injury and provide a basis for a substantial product hazard determination under section 15 of the CPSA if the injury which might occur is serious and/or if the injury is likely to occur. However, a few defective products with no potential for causing serious injury and little likelihood of injuring even in a minor way will not ordinarily provide a proper basis for a substantial product hazard determination.

(iii) *Severity of the risk.* A risk is severe if the injury which might occur is serious and/or if the injury is likely to occur. In considering the likelihood of any injury the Commission and the staff will consider the number of injuries reported to have occurred, the intended or reasonably foreseeable use or misuse of the product, and the population group exposed to the product (e.g., children, elderly, handicapped).

(iv) *Other considerations.* The Commission and the staff will consider all other relevant factors.

(2) *Hazard presented by noncompliance.* Section 15(a)(1) of the CPSA states that a substantial product hazard exists when a failure to comply with an applicable consumer product safety rule creates a substantial risk of injury to the public. Therefore, the Commission and staff will consider whether the noncompliance is likely to result in injury when determining whether the noncompliance creates a substantial product hazard. As appropriate, the Commission and staff may consider some or all of the factors set forth in paragraph (f)(1) of this section in reaching the substantial product hazard determination.

§ 1115.13 Content and form of reports: delegations of authority.

(a) *Written reports.* The chief executive officer of the subject firm should sign any written reports to the Commission under section 15(b) of the CPSA unless this responsibility has been delegated by filing a written delegation of authority with the Commission's Product Defect Correction Division. Delegations of authority filed with the Commission under § 1115.9 of the previous regulations interpreting section 15 of the CPSA will remain in effect until revoked by the chief executive officer of the subject firm. The delegation may be in the following form:

DELEGATION OF AUTHORITY

(Name of company) _____.

I _____ hereby certify that I am Chief Executive Officer of the above-named company and that as such I am authorized to sign documents and to certify on behalf of said company the accuracy and completeness of information in such documents.

Pursuant to the power vested in me, I hereby delegate all or, to the extent indicated below, a portion of that authority to the person listed below.

This delegation is effective until revoked in writing. Authority delegated to:

(Name) _____

(Address) _____

(Title) _____

Extent of authority: _____

_____

_____

Signed:

(Name) _____

(Address) _____

(b) *Distributors and retailers.* A distributor or retailer of a possibly defective or noncomplying consumer product (who is neither a manufacturer nor an importer of that product) satisfies the initial reporting requirements either by telephoning or writing the Product Defect Correction Division, Consumer Product Safety Commission, Washington, D.C. 20207; by sending a letter describing the defective or noncomplying product to the manufacturer (or importer) of the product and sending a copy of the letter to the Commission's Product Defect Correction Division; or by forwarding to the Commission's Product Defect Correction Division reportable information received from another firm. A distributor or retailer who receives reportable information from a manufacturer (or importer) shall report to the Commission unless the manufacturer (or importer) informs the distributor or retailer that a report has been made to the Commission. A report under this subsection should contain the information detailed in paragraph (c) of this section insofar as it is known to the distributor or retailer. Unless further information is requested by the staff, this action will constitute a sufficient report insofar as the distributor or retailer is concerned.

(c) *Initial report.* Immediately after a subject firm has obtained information which reasonably supports the conclusion that a product fails to comply with an applicable consumer product safety rule or contains a defect which could create a substantial risk of injury to the public, the subject firm should provide the Product Defect Correction Division, Consumer Product Safety Commission, Washington, D.C. 20207 (telephone: 301-492-6608), with an initial report containing the information listed below. This initial report may be made by any means; but if it is not in writing, it should be confirmed in writing within 48 hours of the initial report. (See § 1115.14 for time computations.) The initial report should contain, insofar as is reasonably available and/or applicable:

(1) An identification and description of the product.

(2) The name and address of the manufacturer (or importer) or, if the manufacturer or importer is not known, the names and addresses of all known distributors and retailers of the product.

(3) The nature and extent of the possible defect or the failure to comply with an applicable consumer product safety rule.

(4) The nature and extent of the injury or risk of injury associated with the product.

(5) The name and address of the person informing the Commission.

(6) To the extent such information is then reasonably available, the data specified in § 1115.13(d).

(d) *Full report.* Subject firms which file initial reports are required to file full reports in accordance with this subsection. Retailers and distributors may satisfy their reporting obligations in accordance with § 1115.13(b). At any time after an initial report, the staff may modify the requirements detailed in this section with respect to any subject firm. If the staff preliminarily determines that there is no substantial product hazard, it may inform the firm that its reporting obligation has been fulfilled. However, a subject firm would be required to report if it later became aware of new information indicating a reportable defect or noncompliance, whether the new information related to the same or another consumer product. Unless modified by staff action, the following information, to the extent that it is reasonably available and/or applicable, constitutes a "full report," must be submitted to the staff, and must be supplemented or corrected as new or different information becomes known:

(1) The name, address, and title of the person submitting the "full report" to the Commission.

(2) The name and address of the manufacturer (or importer) of the product and the addresses of the manufacturing plants for that product.

(3) An identification and description of the product(s). Give retail prices, model numbers, serial numbers, and date codes. Describe any identifying marks and their location on the product. Provide a picture or a sample of the product.

(4) A description of the nature of the defect or failure to comply with an applicable consumer product safety rule. If technical drawings, test results, schematics, diagrams, blueprints, and other graphic depictions are available, attach copies.

(5) The nature of the injury or the possible injury associated with the product defect or failure to comply with an applicable consumer product safety rule.

(6) The manner in which and the date when the information about the defect or noncompliance (e.g., complaints, reported injuries, quality control testing) was obtained. If any complaints related to the safety of the product or any allegations or reports of injuries associated with the product have been received, copies of such complaints or reports (or a summary thereof) shall be attached. Give a chronological account of facts or events leading to the report under section 15(b) of the CPSA, beginning with receipt of the first information which ultimately led to the report. Also included may be an analysis of these facts or events.

(7) The total number of products and units involved.

(8) The dates when products and units were manufactured, imported, distributed, and sold at retail.

(9) The number of products and units in each of the following: in the possession of the manufacturer or importer, in the possession of private labelers, in the possession of distributors, in the possession of retailers, and in the possession of consumers.

(10) An explanation of any changes (e.g., designs, adjustments, additional parts, quality control, testing) that have been or will be effected to correct the defect or failure to comply and of the steps that have been or will be taken to prevent similar occurrences in the future together with the timetable for implementing such changes and steps.

(11) Information that has been or will be given to purchasers, including consumers, about the defect or

noncompliance with a description of how this information has been or will be communicated. This shall include copies or drafts of any letters, press releases, warning labels, or other written information that has been or will be given to purchasers, including consumers.

(12) The details of and schedule for any contemplated refund, replacement, or repair actions, including plans for disposing of returned products (e.g., repair, destroy, return to foreign manufacturer).

(13) A detailed explanation and description of the marketing and distribution of the product from the manufacturer (including importer) to the consumer (e.g., use of sales representatives, independent contractors, and/or jobbers; installation of the product, if any, and by whom).

(14) Upon request, the names and addresses of all distributors, retailers, and purchasers, including consumers.

(15) Such further information necessary or appropriate to the functions of the Commission as is requested by the staff.

§ 1115.14 Time computations.

(a) *General.* Weekends and holidays are excluded from the computation of the time periods in this part.

(b) *Imputing knowledge.* In evaluating whether or when a firm should have reported, the Commission shall impute to the subject firm knowledge of product safety related information received by an official or employee of a subject firm capable of appreciating the significance of the information. Under ordinary circumstances, 5 days should be the maximum reasonable time for information to reach the Chief Executive Officer or the official or employee responsible for complying with the reporting requirements of section 15(b) of the CPSA. The Commission will impute knowledge possessed by the Chief Executive Officer or by the official or employee responsible for complying with the reporting requirements of section 15(b) of the CPSA simultaneously to the subject firm.

(c) *Time when obligation to report arises.* The obligation to report under section 15(b) of CPSA may arise upon receipt by a subject firm of the first information regarding a noncompliance or a potential hazard presented by a product defect. Information giving rise to a reporting obligation may include, but is not limited to, complaints, injury reports, quality control and engineering data. A subject firm should not await complete or accurate risk estimates before reporting under section 15(b) of CPSA. However, if information is not clearly reportable, a subject firm may spend a reasonable time for investigation and evaluation. (See § 1115.14(d).)

(d) *Time for investigation and evaluation.* A subject firm may conduct a reasonably expeditious investigation in order to evaluate the reportability of a death or grievous bodily injury or other information. This investigation and evaluation should not exceed 10 days unless a firm can demonstrate that a longer period is reasonable. The Commission will deem that at the end of 10 days, a subject firm has received and considered all information which would have been available to it had a reasonable, expeditious, and diligent investigation been undertaken.

(e) *Time to report.* Immediately, that is, within 24 hours, after a subject firm has obtained information which reasonably supports the conclusion that its consumer product fails to comply with an applicable consumer product safety rule or contains a defect which could create a substantial risk of injury to the public, the firm should report. (See § 1115.13.) If a firm elects to conduct an investigation in order to evaluate the existence of reportable information, the 24-hour period begins when the subject firm has information which reasonably supports the conclusion that its consumer product fails to comply with an applicable consumer product safety rule or contains a defect which could create a substantial product hazard. Thus, a firm could report to the Commission before the conclusion of a reasonably expeditious investigation and evaluation if the reportable information becomes known during the course of the investigation. In lieu of conducting an investigation, the firm may report the information immediately.

§ 1115.15 Confidentiality and disclosure of data.

(a) *General.* The Commission does not routinely make reports available to the public until the staff has made a preliminary hazard determination. Copies of reports will not be available to the public in the Commission's public reading room, and information contained in reports will not ordinarily be disclosed to the public in the absence of a formal request.

(b) *Freedom of Information Act.* Any person who submits information to the Commission who believes that any portion of the information is entitled to exemption from public disclosure under the provisions of the Freedom of Information Act, as amended (15 U.S.C. 552(b)), of the CPSA, as amended, or of another Federal statute must accompany the submission with a written request that the information be considered exempt from disclosure or indicate that a written request will be submitted within 10 working days of the submission. The request shall (1) identify the portions of the information for which exemption is claimed, which may include the identity of the reporting firm and the fact that it is making a report, and (2) state the facts and reasons which support the claimed exemption. After the staff has made its preliminary hazard determination, and regardless of whether or not the staff preliminarily determines that a product presents a substantial product hazard, the Commission will no longer honor requests for exempt status for the identity of the reporting firm, the identity of the consumer product, and the nature of the reported alleged defect or noncompliance. This information, together with the staff's preliminary hazard determination, will be made available to the public in the Commission's public reading room. Information for which exempt status is claimed (such as alleged trade secrets, confidential commercial or financial information, or information the disclosure of which would constitute an unwarranted invasion of personal privacy) shall not be released to the public except in accordance with the applicable statute or the Commission's Freedom of Information Act regulations (16 CFR 1015).

(c) *Section 6(b) of the CPSA.* The Commission believes that the first two sentences in section 6(b)(1) of the CPSA (15 U.S.C. 2055(b)(1)) apply to affirmative dissemination of information by the Commission (such as press releases or fact sheets distributed to the public) from which the public may ascertain readily the identity of the product's manufacturer and/or private labeler. Manufacturers and private labelers will ordinarily be given 30 days' notice before the Commission makes such affirmative disseminations. However, this 30-day notice will not apply if the Commission finds that a lesser notice period is required in the interest of public health and safety.

Supreme Court, U.S.
FILED
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CLERK

No. 85-1617

In The
Supreme Court of the United States
October Term, 1985

EMERSON ELECTRIC CO.,

Petitioner,

v.

JANET SWENSON,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

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QUESTION PRESENTED

Did the Minnesota Supreme Court properly find that the Consumer Product Safety Commission reporting rules found at 16 C.F.R. Part 1115.10 are "any other rule or order" within the meaning of 15 U.S.C. Sec. 2072(a) (Consumer Product Safety Act), the breach of which can be the basis for a private cause of action?

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE SUPREME COURT OF MINNESOTA

Respondent opposes Emerson Electric's petition for a Writ of Certiorari to the Minnesota Supreme Court on the grounds that:

1. The Minnesota Supreme Court's decision properly follows this court's decision in *Whirlpool Corp. v. Marshall*, 445 U.S. 1 (1980) that a violation of an interpretive rule may have the force and effect of law.
2. The Minnesota Supreme Court properly decided that the violation of the Consumer Product Safety Commission rule, found at 16 C.F.R. 1115.10(a), constitutes a violation of "any other rule" as required by 15 U.S.C. Sec. 2072(a).
3. The Minnesota Supreme Court's opinion is entirely consistent with this court's previous rulings—thus, no new issue is before this court.

———o———

OPINIONS BELOW

The opinions of the Minnesota Supreme Court, Minnesota Court of Appeals and trial court are attached to Petitioner's brief at Appendix A through C.

I. STATEMENT OF THE CASE

This is an interlocutory appeal. Trial has been set for September 8, 1986.

On September 10, 1979, Edward Swenson was killed by an LP gas explosion while attempting to light an A.O. Smith water heater. Swenson claims the explosion was caused by a gas leak through the Emerson control on the A.O. Smith water heater. Plaintiff claims both Emerson and A.O. Smith have known since the mid 1960's—long prior to the manufacture of the subject control—that contaminants enter gas controls through the gas line and can cause gas leaks resulting in explosion. A filter, designed to filter out these contaminants, was designed prior to the date the subject control was manufactured. Emerson and A.O. Smith nevertheless elected not to employ this filter because of price and other considerations. An A.O. Smith employee in 1971 admitted the seriousness of potential injuries due to gas leakage caused by contaminated controls; however, no action was taken until one year prior to the instant explosion. In 1978, Emerson and A.O. Smith incorporated a built-in filter on all LP gas controls. The filter was designed to filter out the leakage-causing contaminants. A number of claims, explosions and lawsuits occurred prior to the instant explosion, believed to be caused by contaminated Emerson gas valves; yet neither Emerson nor A.O. Smith recalled the product or contacted the Consumer Product Safety Commission until 1980. The subject control was recalled in 1980, one year post-explosion.

Respondent Swenson asserts the following claims against Emerson and A.O. Smith.

a. Negligence,

b. Strict liability in tort,

c. Punitive damages for conduct considered to be callous disregard for the safety of the consuming public,

d. Violation of the Consumer Product Safety Commission reporting rules. (The issue now on appeal).

II. PROCEDURAL HISTORY

Action on behalf of Janet Swenson and her four minor children for the death of her husband Edward was commenced in 1981. On June 6, 1983, she amended her complaint alleging a violation of the reporting requirements of the Consumer Product Safety Act (this was later amended to allege a violation of the reporting rules of the Consumer Product Safety Commission—in accordance with court order).

III. STATUTORY AUTHORITY

Congress in enacting the Consumer Product Safety Act included a provision at 15 U.S.C. Sec. 2072(a) which states:

> "(a) *any person* who shall sustain injury by reason of a knowing (including willful) violation of a Consumer Product Safety Rule, *or any other rule or order issued by the Commission* may sue any person who knowingly (including willfully) violated any such rule or order . . ." (Emphasis added)

The Act also requires manufacturers to report certain conditions in 15 U.S.C. Sec. 2064(b) (Section 15(b) of the Act):

> "(b) Every manufacturer of a consumer product distributed in commerce and every distributor and retailer of such product, *who obtains information which reasonably supports the conclusion that such product:*

(1) fails to comply with an applicable consumer product safety rule; or

(2) *contains defect which could create a substantial product hazard* described in subsection (a) (2) of this section.

shall immediately inform the Commission of such failure to comply or of such *defect* unless such manufacturer, distributor or retailer has actual knowledge that Commission has been adequately informed of such defect or failure to comply." (Emphasis added)

In addition, the Act expressly authorized the Commission to adopt rules requiring manufacturers to report certain information to the Commission. The Act provides at 15 U.S.C. Sec. 2076(e) as follows:

"The Commission may by rule require any manufacturer of consumer products to provide to the Commission such *performance* and technical data related to *performance* and *safety* as may be required to carry out the purposes of this act." (Emphasis added)

Pursuant to the authority granted to it by Sec. 2076(e) of the CPSA, the Commission has promulgated reporting rules, including 16 C.F.R. Part 1115.10(a):

"Every manufacturer . . . of a consumer product that has been distributed in commerce *who obtains information that such consumer product contains a defect which could create a substantial risk of injury* to the public shall *immediately notify the . . . Consumer Product Safety Commission . . .*" (Emphasis added)

Swenson claims that Emerson and A.O. Smith violated this rule. Emerson, in its defense states numerous convoluted issues and plays word games concerning the

effect of "interpretive guidelines," all in an apparent effort to obfuscate the straightforward issue.

IV. SUMMARY OF ARGUMENTS:

Respondent will analyze the issue in several steps:

1. 16 C.F.R. Part 1115.10(a) is enforceable by a private cause of action whether it is considered legislative (substantive) or interpretive because it fairly interprets the statute. Interpretive rules can have the force and effect of law. *Whirlpool Corp. v. Marshall*, 445 U.S. 1 (1980).

2. A review of the legislative history will show that Congress intended a broad range of private causes of action to be created by the Act. Thus, the Court should feel confident in giving the clear language of the Act which states "any other rule" its simple interpretation to include the rule developed by the Commission that is contained in 16 C.F.R. Part 1115.10(a).

3. The rule in question (16 C.F.R. Part 1115.10(a)) was adopted pursuant to specific legislative authority (15 U.S.C. 2076(e)).

4. Petitioner's Writ of Certiorari does not raise important questions of federal law nor does it involve a federal question which conflicts with applicable decisions of this Court. Thus, in accordance with Rule 17 of the Supreme Court Rules Certiorari should not be issued.

V. THE DECISION BELOW CONFORMS WITH U.S. SUPREME COURT RULINGS THAT VIOLATION OF A RULE—SUBSTANTIVE OR INTERPRETIVE —HAS THE FORCE AND EFFECT OF LAW IF IT REASONABLY INTERPRETS STATUTORY AUTHORITY.

This Court has ruled that an agency rule, whether substantive or interpretive, which reasonably interprets statutory authority has the force and effect of law. *Whirlpool Corp. v. Marshall,* 445 U.S. 1, 11 (1980). In *Whirlpool,* the Occupational Health and Safety Administration promulgated a rule that employees could walk off the job when faced with an unsafe work place condition. When they did so the employer officially reprimanded them. The employees sued seeking an injunction against the reprimand, claiming their actions were sanctioned by federal law (the above referred to OSHA rule). The employer claimed the OSHA rule was merely interpretive and, thus, unenforceable. Nothing in the Act explicitly provided for such a rule. However, this Court held that because the regulation clearly conformed to the fundamental objective of the Act, even though interpretive, it should be given the force and effect of law. This Court stated:

> "The question before us is whether this *interpretive* regulation constitutes a permissible gloss on the Act by the Secretary, in light of the Act's language, structure, and legislative history. Our inquiry is informed by an awareness that *the regulation is entitled to deference unless it can be said not to be reasoned and supportable interpretation of the Act. Skidmore v. Swift & Co.,* 323 U.S. 134, 139-140. *See Ford Motor Credit Co. v. Milhollin,* 444 U.S. 555; *Mourning v. Family Publications Service, Inc.,* 411 U.S. 356." (Emphasis added)

Id. at 11. This Court gave the regulation the force and effect of law and further stated:

> "The regulation thus on its face appears to further the overriding purpose of the Act, and rationally to complement its remedial scheme. In the absence of some contrary indication in the legislative history, *the Secretary's regulation must, therefore, be upheld, particularly when it is remembered that safety legislation is to be liberally construed to effectuate the congressional purpose. United States v. Bacto-Unidisk,* 394 U.S. 784, 798; *Lilly v. Grand Truck R. Co.,* 317 U.S. 481, 486." (Emphasis added)

Id. at 13.

The rule of law is clear. Even if the reporting requirements are considered interpretive, they have the force and effect of law if they reasonably interpret the statute (CPSA). *Skidmore v. Swift & Co.,* 323 U.S. 134 (1944); *Granville House, Inc. v. Department of Health and Human Services,* 715 F.2d 1292 (8th Cir. 1983); *Production Tool Corporation v. Employment and Training Administration,* 688 F.2d 1161 (7th Cir. 1982); Davis, 2 *Administrative Law Treatise,* Sec. 7:13 (1979).

This Court in *Skidmore* confirmed that interpretive rules can be given great weight. The Court stated.

> "The weight of such a judgment [an interpretive rule or decision] in a particular case 'will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.' "

Id. at 140.

The court in *Production Tool Corporation v. Employment Training Administration,* 688 F.2d 1161 (7th

Cir. 1982) noted that the rule at issue in that particular case had been subject to the notice and opportunity to comment provision of 5 U.S.C. Sec. 553, Administrative Procedures Act, and state as follows:

> "The interpretation of a statute by the agency charged with enforcement or administration is entitled to great deference provided it is consistent with the congressional purpose . . . Deference is especially appropriate where, as here, the rule was adopted only after all interested persons were given notice and an opportunity to comment pursuant to § 553 procedures."

Id. at 1167.

The CPSC rule in question here was adopted pursuant to the rule making authority for legislative rules found in the Administrative Procedure Act (5 U.S.C. Sec. 553). This requires published notice of the Commission's intention to adopt the rules and the allowance of a time for comment. The Consumer Product Safety Commission did publish such proposed rules and did allow time for comment. If the Commission wished to adopt unenforceable rules only, it need not have published this notice nor requested comment. The fact that it did publish and request comment, and that it complied with the Administrative Procedures Act for passage of substantive rules, is strong evidence to substantiate a finding that the reporting requirement rules should have the force and effect of law.

It should further be noted that the word "rule" is defined in the Administrative Procedures Act at 5 U.S.C. Sec. 551(4) to include an agency statement which interprets law or policy.

There can be no question that the reporting rule is both authorized and fairly interprets the Consumer Product Safety Act. Section 2076(e) of the Act specifically authorizes the Commission to formulate rules affecting performance and safety of products. Section 15(b) of the act (15 U.S.C. Sec. 2064(b)) requires each manufacturer who obtains information that its product contains a defect which could create a substantial product hazard to immediately report same to the Commission. It is clear that this statutory authority has been reasonably interpreted by the Commission rules found at 16 C.F.R. Part 1115.10 (a) which requires each manufacturer who obtains information that its consumer product contains a defect which could create a substantial risk of injury to immediately notify the Commission. The Minnesota Supreme Court's finding that the substantial product hazard reporting regulations reasonably interpret the act cannot be successfully challenged.

It is interesting to note that the Consumer Product Safety Commission in publishing the rules stated: "In issuing these rules under § 15 of the CPSA the Commission believes it has reasonably interpreted the provisions and obligations of that section." 43 Fed. Reg. 34990 (1978).

Emerson's reliance on *Chrysler Corporation v. Brown*, 441 U.S. 281 (1979) and other cases cited on page seven of their brief to sustain their claim that a violation of an interpretive rule cannot have the force and effect of law are misplaced. The *Chrysler* case does not stand for that proposition. The *Chrysler* case stands for the proposition that where the Department of Labor *does not have statutory authority to promulgate a rule* the rule is void and

unenforceable. See this Court's language at 441 U.S. 304, 306 and 307. In the instant case the reporting rules are clearly based upon appropriate statutory authority.

VI. THE LANGUAGE OF THE CONSUMER PRODUCT SAFETY ACT (15 U.S.C. Sec. 2072(a)) AND THE LEGISLATIVE HISTORY COMPEL A CONCLUSION THAT A VIOLATION OF THE REPORTING RULES OF THE CPSC AUTHORIZE A PRIVATE SUIT.

The Consumer Product Safety Act (15 U.S.C. Sec. 2072(a)) provides that any person may bring a private claim for the violation of a Consumer Product Safety rule or *any other rule* of the Commission.

The legislative history clearly shows that the first draft of this section was much more limiting. The original version of the house bill limited private claims to "Consumer Product Safety Rule" violations. (H.R. 15003, 92nd Cong., 2d Sess. § 231(a)(1) and (2) 1972). A later version of the house proposed bill allowed private claims for violation of a "Consumer Product Safety Standard, Regulation or Order issued by the Commissioner." (Cong. Rec.-House, Sept. 20, 1972, p. 31402). The Conference Committee of the Senate and House version and the final bill adopted by Congress allowed private claims for violation of "any other rule or order" issued by the Commission. (H.R. Rep. No. 1592, 92nd Cong., 2d Sess. 22 (1972)).

The word "any" must be given meaning. If Congress wished only substantive rules to form the basis of a violation it could have said so. It did not.

VII. THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW SUBJECT TO REVIEW. THE SAME ISSUES HAVE BEEN DECIDED BY THIS COURT IN EARLIER DECISIONS.

Rule 17 of the Supreme Court Rules identifies three areas in which this Court will consider a Writ of Certiorari. Clearly neither subdivisions (a) or (b) are applicable. As of this date there is no other state appellate or federal appellate court decision on this issue.

Subdivision (c) does not apply in that the question of federal law raised by Defendant has previously been settled by this court in the *Whirlpool* and *Skidmore* cases. Petitioner's claim that interpretive rules can never have the force and effect of law is without merit and is contrary to the above-captioned opinions. There is no new issue raised by Petitioner not previously decided by this Court.

VIII. REBUTTAL TO COLLATERAL ISSUES RAISED BY PETITIONER.

1. Petitioner wishes to make this a political rather than a legal issue. It argues that there are too many product liability cases and cites a 758 percent increase in case filings since 1974. Yet only one case involving this CPSC issue has ever been ruled upon by any appellate court in the nation (the instant case). The Consumer Product Safety Act was passed in 1973. The reporting regulation (16 C.F.R. part 1115.10(a)) was promulgated in 1974. Defendant cites seven cases in which opinions on this issue have been written (plus the instant case). Of those seven cases five

federal district courts have sustained the cause of action; two have denied it.

Defendants make the flood gates argument—but where is the flood?

2. Petitioner claims that inclusion of the CPSC claim will significantly expand discovery, relevancy of evidence and trial. They have made the same claims below. They are wrong. Whether or not there is a separate cause of action for violation of the reporting rules of the CPSC this violation would be admissible into evidence as part of a product manufacturer's common law duty to warn and recall. It may not state a separate cause of action but is certainly a relevant standard of conduct which should be considered in a common law negligence case. The jury issue is not as presented by petitioner, whether the CPSC would recall the product—but whether under the guidelines of the CPSC the product manufacturer should recall the product on his own. Under these conditions there is no speculative guessing of what the Commission would do but a reasoned interpretation of rules and judgment as to what the product manufacturer should have done to serve the public safety.

3. Although the only new element of damage made available by the Act is collection of attorney's fees and costs it is believed that this cause of action will assist in the settlement of cases and clear many federal and state court calendars. The CPSC reporting rules create clear and concise

recall guidelines easily understood by lay juries. Product manufacturers who have intentionally violated these rules are (and should be) concerned about the jury's reaction to evidence of their INTENTIONAL violation of these rules. Only evidence of the most callous and reckless conduct will sustain this burden of proof. Retention of this cause of action will bring pressure to bear where it belongs—and get these cases settled.

4. As petitioner states, the CPSA is primarily intended to protect the public from defective products. Yet recent publications of the Commission strongly suggest that due to monetary restraints the Commission cannot fully perform its job and needs the help of private litigants. *See* comments printed at 49 Fed. Reg. 13820 (1984); and 49 Fed. Reg. 13821-2 (1984).

5. The trial court opinion of *Morris v. Coleco Indus.*, 587 F.Supp. 8 (E.D. Va. 1984) is not on point. In contrast to the present case, *Morris* involved an alleged violation of the statute—not the rule. The trial court in *Kahn v. Sears Roebuck & Co.*, 607 F.Supp. 957 (N.D. Ga. 1985) does not appear to have been aware of the instant case, or *Drake v. Lochinvar Water Heater, Inc.*, 618 F.Supp. 549 (D. Minn. 1985) (appeal docketed, No. 85-5179-Mn (8th Cir. 1985)), *Wilson v. Robertshaw Controls, Inc.*, 600 F.Supp. 671 (N.D. Ind. 1985), or *Payne v. A.O. Smith Corporation*, 578 F.Supp. 733 (S.D. Ohio 1983). Well reasoned opinions by federal trial judges in each case sus-

tained the CPSC claim. Nor did the *Kahn* court cite legislative history. Its logic is simply faulty and should not be followed.

IX. CONCLUSION

This petition raises nothing new that has not been previously decided and is premised upon erroneous logic. The petition for certiorari should be denied.

Respectfully submitted,

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April 1986

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No. 85-1617

IN THE

Supreme Court of the United States

October Term, 1985

Emerson Electric Co.,

Petitioner,

vs.

Janet Swenson,

Respondent.

BRIEF OF RESPONDENT A. O. SMITH CORPORATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

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April 1986

1986—Northwest Printing Co., 3010 2nd St. No., Minneapolis, MN 55411—588-7506

QUESTION PRESENTED

Respondent A. O. Smith Corporation joins with Petitioner Emerson Electric Co. in its formulation of the question presented.

LIST OF PARTIES

The parties to the proceeding in the Minnesota Supreme Court were Emerson Electric Co., A. O. Smith Corporation, Lake Region Cooperative, and Janet Swenson.

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IN THE

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October Term, 1985

No. 85-1617

Emerson Electric Co.,

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vs.

Janet Swenson,

Respondent.

BRIEF OF RESPONDENT A. O. SMITH CORPORATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

Respondent A. O. Smith Corporation supports the Petition of Emerson Electric Co. for a writ of certiorari to review the decision of the Minnesota Supreme Court holding that Section 23 of the Consumer Product Safety Act ("CPSA") permits a private right of action for conduct that did not conform to nonbinding interpretive regulations issued by the U.S. Consumer Product Safety Commission ("CPSC").

OPINIONS BELOW

The relevant opinions by the Minnesota Supreme Court, 374 N.W.2d 690 (1985), and the Minnesota Court of Appeals, 356 N.W.2d 313, are attached as Appendices A and B, respectively, to the Petition of Emerson Electric Co.

JURISDICTION

Respondent's counsel at the trial court and throughout the appellate process in the Minnesota Courts received a service copy of the Petition on April 7, 1986. Counsel during that period was Thomas L. Athens, of the firm Arvesen, Donoho, Lundeen, Hoff, Svingen & Athens, 125 South Mill Street, Fergus Falls, Minnesota. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

STATUTES AND REGULATIONS INVOLVED

Sections 15(b) and 23(a) of the CPSA, 15 U.S.C. §2064 (b) and §2702(a) and the relevant CPSC regulations, 16 C.F.R. Part 1115, are attached in pertinent part as Appendices E and F, respectively, to the Petition of Emerson Electric Co.

STATEMENT OF THE CASE

Respondent joins in the Statement of the Case in the Petition with the single addition that Respondent, in addition to Petitioner Emerson Electric Co., opposed Janet Swenson's motion in the trial court to amend her Complaint to add a private cause of action under Section 23 of the CPSA and has been a party to the appeals seeking to reverse the rulings permitting the amendment.

REASONS FOR GRANTING THE WRIT

The decision by the Minnesota Supreme Court ignores the line of legal precedents of this Court distinguishing between interpretive and legislative or substantive rules. Furthermore, it ignores the express intention of the CPSC that the interpretive rule regarding reporting under the CPSA

is to be interpretive rather than substantive and that the rule was promulgated, in part, to clarify existing confusion about whether the rule had been substantive or interpretive. On legal merits alone, the decision of the Minnesota Supreme Court is in error.

The lower court's decision also will lead inevitably to confusion and conflict in the interpretation and application of the interpretive rule by state and federal courts and by juries. Inevitably, there will be substantial conflict among the courts of this land over when and how to submit the cause of action. Furthermore, that conflict will be compounded by the confusion juries must confront in deciding how to apply the law as it is given to them. Taken together all of this will impact adversely on the state and federal courts, on the litigants, and on the manufacturers of consumer products and the liability insurance crisis they face.

I.

THE DECISION BELOW IGNORES THIS COURT'S DECISIONS REGARDING THE DISTINCTION BETWEEN INTERPRETIVE AND LEGISLATIVE RULES AND THE CPSC'S EXPRESS INTENT.

The decision by the Minnesota Supreme Court glosses over and tends to obliterate the distinction between an interpretive rule and a substantive rule, a distinction the CPSC itself understood well when it promulgated its rule describing its views of manufacturers' reporting obligations under the CPSA. *See* 43 Fed. Reg. 34,998 (1978) *codified at* 16 C.F.R. §1115.1-22 (1985). Such an obliteration is in direct contrast with and flies in the face of repeated decisions by this Court distinguishing between interpretive

and legislative rules and holding that interpretive rules operate as guideposts, in effect, as to how a particular statute will be interpreted and enforced by the appropriate government authority. *Chrysler Corp v. Brown*, 441 U.S. 281 (1979); *Batterton v. Francis*, 432 U.S. 416 (1977); *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). It also ignores the express comments of the CPSC regarding the administrative intent of the reporting guidelines. In its introduction to the rule at issue, the CPSC stated: "The Commission considered the difference between promulgating the rule as substantive or interpretive, sought public comment on the issue . . . and has decided to promulgate the rule as interpretive." 43 Fed. Reg. 34,998 (1978). In the language immediately preceding these comments, the CPSC clearly indicated it was taking this action in response to confusion over the rule and observations by commentators which "indicated that the rule was substantive in effect." Id.

The Minnesota Supreme Court has ruled so as to permit a private party to sue for damages because of an alleged violation of an interpretive rule that was promulgated by the CPSC specifically to clarify confusion concerning reporting obligations. The rule was not promulgated with any apparent intent that it would or should be used by private litigants as an anvil on which to enforce private rights. Indeed, there is no authority or suggestion that the CPSC or Congress intended such private cause of action.

Respondent supports the Petition of Emerson Electric Co. and requests this Court to grant review and to reverse the decision of the Minnesota Supreme Court by recognizing the interpretive nature of the CPSC's reporting regula-

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tion and by restricting the scope of private right of action to that expressly stated in the CPSA.

II.

THE DECISION BY THE LOWER COURT HAS IMPORTANT SOCIAL AND LEGAL IMPLICATIONS THAT WARRANT REVIEW BY THIS COURT

The decision by the Minnesota Supreme Court, in light of the widely discussed and publicized crises over the cost and availability of liability insurance, can only have harmful legal and social consequences. If permitted to stand, the decision will spawn broader and more difficult litigation issues for manufacturers of consumer products and for the courts. Furthermore, the consequences of permitting private actions for failure to comply with the CPSC's interpretive rule regarding reporting are likely to include conflicting determinations by different juries that identical conduct both violates and complies with the rule.

The liability insurance crises is a topic of almost daily debate or discussion in one forum or another. Regardless of the actual depth and breadth of the crisis, there is little question that the crisis is real. Adding to the private litigants' arsenal a cause of action against manufacturers of consumer products for failure to comply with the CPSC's interpretive rule regarding reporting can only add fuel to the flame. The new cause of action will broaden discovery, permit evidence to be introduced at trial that may well be excluded otherwise, and add the threat of damages which include attorneys' fees. As a practical matter, all of this will combine to make litigation more costly and threatening for manufacturers of consumer products and, hence,

will make the cost of liability insurance more expensive and, surely in some instances, unavailable. Whatever the current dimensions of the liability crisis, they are certainly to grow if the decision by the Minnesota Supreme Court is permitted to stand.

The lower court's decision also will lead inevitably to confusion in the minds of jurors and judges over how to decide issues raised by a private right of action under the interpretive rule. *See* Petition for Writ of Emerson Electric Co., n.8 at 12. One can easily imagine a court's difficulty in deciding whether the evidence justifies allowing the cause of action to be submitted to a jury and, even more problematical, in fashioning an appropriate instruction or instructions to a jury. Inevitably, the cause of action as it is submitted to a jury will likely have nearly as many forms as there are numbers of individual state and federal courts. Compounding this likely confusion is the confusion jurors will have trying to apply the law as it is given to them. They will be forced to speculate about what the CPSC might have done had it addressed the allleged violation of the interpretive rule.

The conflict and confusion within the products liability arena that will be engendered by the decision of the Minnesota Supreme Court will also add to the liability insurance crisis. Both the creation of such conflict and confusion as well as the resulting exacerbation of a significant and widely acknowledged social and legal crisis warrant this Court accepting review of the lower court's decision. Further litigation in the courts below is unlikely to provide any further elucidation of this issue. This Court will inevitably be called upon again to resolve this question and, indeed, must eventually resolve it. To postpone this Court's

review and decision will only serve to the detriment of the federal and state court systems as well as to the litigants who will spend enormous amounts of time, money and effort litigating claims improperly brought under the CPSA in violation of precedents of this Court and the express intention of the CPSC.

CONCLUSION

For the foregoing reasons, Respondent A. O. Smith Corporation supports the Petition for Certiorari of Emerson Electric Co. and respectfully requests that the Petition be granted.

Respectfully submitted,

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No. 85-1617

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

EMERSON ELECTRIC CO.,
Petitioner,

v.

JANET SWENSON,
Respondent.

MOTION AND BRIEF OF AMICI CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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OCTOBER TERM, 1985

No. 85-1617

EMERSON ELECTRIC CO.,
Petitioner,

v.

JANET SWENSON,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 36.1, the Chamber of Commerce of the United States, American Home Appliance Manufacturers (AHAM), Gas Appliance Manufacturers Association (GAMA), National Electrical Manufacturers Association (NEMA), National LP-Gas Association (NLPGA), Portable Power Equipment Manufacturers Association (PEMA), and Toy Manufacturers of America (TMA) hereby seek leave to file the accompanying brief as amici curiae in support of Emerson Electric Co.'s petition for certiorari. Counsel for petitioner has consented to the filing of the brief. The consent of counsel for respondent was requested but not obtained.

The amici are nonprofit organizations that represent a broad range of business interests affected by the Consumer Product Safety Act (CPSA):

—The Chamber of Commerce of the United States represents a cross-section of the business community throughout the United States.

—AHAM represents 26 major and 38 portable appliance manufacturers engaged in the manufacture of products for kitchens, home laundry, personal care, and home comfort.

—GAMA has approximately 230 members who are engaged in the manufacture of gas and oil furnaces, gas boilers, gas and electric water heaters, gas controls, gas ranges, and direct heating equipment.

—NEMA has 550 members who are engaged in the manufacture of electrical equipment, including components and end-use equipment for the generation, transmission, distribution, control, and use of electricity.

—NLPGA is composed of 4,000 members representing producers, transporters, wholesalers, and retailers of liquified petroleum gas, and manufacturers and distributors of associated equipment and appliances.

—PPEMA has 23 members who are engaged in the manufacture of chain saws, brush cutters, handheld and backpack blowers, and related products.

—TMA has 255 members who are engaged in the manufacture of toys, games, and ornaments.

The interest of the amici in the petition for certiorari derives from the urgent need to clarify their members' rights and liabilities under Section 23 of the CPSA, 15 U.S.C. § 2072.

Many of the amici's members manufacture consumer products and are subject to the substantial product reporting requirements prescribed by Section 15(b) of the CPSA. For this reason, many of the amici's members have been named in suits brought under Section 23 of the CPSA. In these actions, private plaintiffs have asserted a cause of action under Section 23 for alleged violations of the reporting obligations embodied in the CPSC regulations implementing Section 15(b).

The decision of the Minnesota Supreme Court recognize a private remedy under Section 23 for alleged noncompliance with the CPSC interpretative regulations under Section 15(b). The amici believe their members would be exposed to unnecessary and unjustified litigation if the decision below is allowed to stand. At a time of rising public concern about the mushrooming costs of product liability litigation, allowing personal injury plaintiffs to invoke the private remedy provisions of the CPSA could have a serious adverse impact on the manufacturers and sellers of consumer products that the amici represent.

For the foregoing reasons, the amici curiae seek permission to file the accompanying brief in support of the petition for writ of certiorari.

Respectfully submitted,

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May 1986

QUESTION PRESENTED

Whether interpretative regulations issued by the Consumer Product Safety Commission to explain the reporting requirements of the Consumer Product Safety Act constitute a rule or order whose violation gives rise to a private right of action under Section 23 of the Act.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1617

EMERSON ELECTRIC CO.,
Petitioner,

v.

JANET SWENSON,
Respondent.

BRIEF OF AMICI CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

This amici curiae brief is submitted by seven business and trade organizations in support of Emerson Electric Co.'s petition for a writ of certiorari to review the decision of the Minnesota Supreme Court.

OPINIONS BELOW

The opinions below are properly listed in and appended to the petition for a writ of certiorari.

JURISDICTION

The amici adopt the petitioner's statement of jurisdiction.

STATEMENT OF THE CASE

The amici adopt the statement of petitioner.

INTEREST OF AMICI

The amici are seven business and trade organizations that represent industries engaged in producing and marketing products used by consumers. The amici's members are subject to Section 15(b) of the Consumer Product Safety Act (CPSA), which requires manufacturers, distributors, and retailers of consumer products to notify the Consumer Product Safety Commission (CPSC) if they obtain information which provides a reasonable basis to conclude that a product contains a defect which could create a substantial product hazard. 15 U.S.C. § 2064. Increasingly, manufacturers and sellers of consumer products have been named as defendants in private suits seeking damages under Section 23 of the CSPA for alleged violations of the CPSC regulations construing Section 15(b). The amici are deeply disturbed about this trend, and have a strong interest in clarifying whether their members can be held liable in private litigation for noncompliance with the CPSC interpretative regulations under Section 15(b).[1]

SUMMARY OF ARGUMENT

The lower court's decision should be reviewed because, if allowed to stand, it will engraft new and unauthorized remedies on a federal regulatory statute and undermine longstanding principles of administrative law. Section 23 of the CPSA limits private damage suits to "violations" of "rules or orders." Although violations of statutory provisions such as Section 15(b) are outside the coverage of Section 23, the decision of the lower court circumvents this limitation by recognizing a private remedy for noncompliance with CPSC regulations interpreting the statutory reporting duty. The effect of this

[1] The amici do not intend to address whether the petitioner fulfilled its reporting obligation under Section 15(b) in this case. The amici have joined in this brief only to address the legal issues the petition raises.

holding is to give nonbinding regulations the force and effect of law, thereby violating the well-established doctrine that interpretive regulations are unenforceable.

The decision of the Minnesota Supreme Court also should be reviewed because of its far-reaching practical implications. The dramatic explosion in product liability litigation is one of the most pressing problems facing manufacturers and sellers of consumer products. If permitted to stand, the decision of the lower court will aggravate this problem by needlessly expanding the remedies available to product liability plaintiffs, creating additional incentives for suit, and increasing the cost and complexity of litigation. Because these developments would undermine the growing movement to bring needed reform to the tort compensation system, there is a compelling need for this Court to clarify whether private litigants can maintain damage suits for alleged violations of the CPSA's reporting requirements.

ARGUMENT

I. THE DECISION OF THE LOWER COURT SHOULD BE REVIEWED BECAUSE IT DISTORTS THE ENFORCEMENT SCHEME ESTABLISHED BY CONGRESS AND IMPOSES NEW AND UNAUTHORIZED OBLIGATIONS ON MANUFACTURERS.

In violation of established administrative law principles, the decision of the court below converts regulations that the issuing agency considered nonbinding into enforceable requirements. If allowed to stand, the decision will seriously distort the regulatory scheme established by Congress and retroactively impose new obligations on manufacturers of consumer products.

The lower court recognized that noncompliance with Section 15(b) could not provide the basis for a private damage suit because the private remedy created by Section 23 is available only for alleged violations of CPSC

rules or orders (App. 17a).[2] However, the court then permitted private claimants to seek damages for alleged nonreporting on the basis of the CPSC regulations, 16 C.F.R. Part 1115, which construe the Section 15(b) reporting requirement. In essence, the court found that these regulations are "rules" which can be "violated" for purposes of Section 23.[3]

At the time it issued the regulations, the Commission stressed that they would be strictly interpretive in character:

> The Commission considered the difference between promulgating the rule as substantive and interpretive, sought public comments on the issue at the public hearings in April and May of 1978, and has decided to promulgate the rule as interpretive.

43 Fed. Reg. 34,990 (Aug. 7, 1978) (quoted at App. 2f). The Commission emphasized that, in contrast to a substantive rule, "an interpretive rule offers guidance as to what a law means, but does not itself have the force and effect of law." *Id.*

Under this Court's decisions, an interpretive rule such as 16 C.F.R. Part 1115 may clarify how the agency views the law, but it is not legally binding. *See, e.g., Chrysler Corporation* v. *Brown*, 441 U.S. 281, 301-02 (1979); *Batterton* v. *Francis*, 432 U.S. 416, 424-26

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[2] References to "App." are to the Appendix to the petition for a writ of certiorari filed by Emerson Electric Co.

[3] An article critical of the *Swenson* court analysis has noted that "there can be no *violation* of an interpretive rule per se; what appears to be a violation of an interpretive rule is in fact a violation of the underlying statute . . . ." Note, *Private Causes of Action Under the Reporting Rules of the Consumer Product Safety Act*, 70 MINN. L. REV. 955, 968 (1986) (emphasis in original). The article, which extensively examines the implications of basing a private right of action on violation of interpretive rules, concludes that "there can be no violation, and, by extension, no private cause of action for a violation, of an interpretive rule." *Id.* at 969.

(1977). A court construing the statute may seek the benefit of the agency's experience and judgment as reflected in an interpretive rule, but conduct that departs from the rule will be unlawful only if the court concludes that the statute itself has been violated.

By holding that the CPSC's regulations construing Section 15(b) can provide a basis for damage awards, the decision below accords these regulations the force and effect of law. This result directly conflicts with the Court's repeated recognition that interpretive regulations are nonbinding and, in and of themselves, cannot give rise to enforceable duties and liabilities.

The availability of a private remedy for alleged reporting violations would fundamentally reshape the enforcement scheme that Congress established when it enacted the CPSA.[4] Although Congress limited the private remedy provisions of Section 23 to violations of rules and orders, private litigants could seek damages for noncompliance with statutory requirements merely because the Commission has issued interpretive regulations explaining how those requirements should be applied. Thus, the Commission's publication of nonbinding guidelines to assist the regulated community in understanding Section 15(b) would create far-reaching liabilities in private suits that otherwise would not exist.

Equally troubling, since the Commission's regulations would constitute binding "rules" for purposes of Section 23, they would be enforceable by private litigants in damage actions even though the CPSC could not enforce the regulations directly in suits against manufacturers.

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[4] As one commentator has noted: "The statutory scheme of the CPSA indicates that Congress did not intend to create a private cause of action for violations of rules that the Commission chose to promulgate as its interpretation of the reporting requirements of section 15(b)." Note, *Private Causes of Action Under the Reporting Rules of the Consumer Product Safety Act*, 70 MINN. L. REV. at 978.

It is plainly irrational to permit private litigants to enforce regulations that the Commission itself could not enforce, since the role of private litigants in implementing the statutory scheme is necessarily more limited than that of the Commission.

The lower court's holding that the Commission's regulations are enforceable in private suits threatens to alter dramatically the role of the regulations in day-to-day compliance with Section 15(b). At the time of their promulgation in 1978, the Commission specifically acknowledged that firms "charged with violating section 15 through acts which are contrary to these rules will always have an opportunity to urge the reasonableness of [their] actions under the circumstances, thereby defeating the accusation." 43 Fed. Reg. 34,990 (App. 3f). Because of this assurance, amici and their members did not seek judicial review of the regulations even though several of their provisions reflected a questionable interpretation of Section 15(b). The decision of the lower court effectively nullifies the ability of manufacturers and sellers to challenge the agency's interpretation of the statute in individual cases by declaring—with little explanation or analysis—that the CPSC regulations represent "a reasonable interpretation of the CPSA" and therefore should receive "authoritative effect" in private damage suits (App. 25a). This holding retroactively changes the character of the CPSC's regulations, and imposes new obligations on manufacturers, by giving the regulations a binding effect they were never intended to have.

The distortion of a federal regulatory statute created by the lower court's interpretation of Section 23, and the court's disregard of basic administrative law principles, provide important reasons why this Court should grant review.

II. THE AVAILABILITY OF A PRIVATE RIGHT OF ACTION FOR BREACH OF THE CPSC INTERPRETIVE REGULATIONS UNDER SECTION 15(b) HAS FAR-REACHING IMPLICATIONS FOR PRODUCT LIABILITY LITIGATION.

In recent years, personal injury litigation involving consumer products has mushroomed dramatically.[5] This trend has been accompanied by an explosive growth in litigation costs and damage awards.[6] In response to these developments, insurance premiums have risen steeply and insurance coverage for some products has ceased to be available.[7] Widespread concern has been expressed about

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[5] According to a recent report by a presidential task force, the number of product liability cases filed annually in the federal courts has increased 758 percent since 1974. *See* Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability 45 (Feb. 1986).

[6] The size of jury verdicts awarding compensatory and punitive damages has increased astronomically in many areas of tort law. *See* Report of the Tort Policy Working Group, *supra*, at 47. The average product liability jury verdict rose from $393,580 in 1975 to $1,850,452 in 1985, a 370 percent jump. *See* Jury Verdict Research, Inc., *Injury Valuation: Current Awards Trends*, No. 304 (1986).

[7] The presidential task force assigned to examine the crisis in insurance availability and affordability cited reports by the Toy Manufacturers of America, the Association of Home Appliance Manufacturers, the National LP-Gas Association, the Portable Power Equipment Manufacturers Association, and other trade associations indicating that their members have had increasing difficulty obtaining insurance in view of the dramatic increase in the number and amount of product liability awards. *See* Report of the Tort Policy Working Group, *supra*, at 10-13. For example, the outdoor power equipment manufacturers have experienced premium increases of from 50 percent to 70 percent during 1985, with some renewals ranging 400 to 600 percent higher than last year. *Id.* at 13. As a result of the high cost and unavailability of insurance, nearly one-quarter of the transporters of liquified petroleum gas have been forced to operate with less than the $5,000,000 in insurance coverage that federal law requires for motor carriers. *Id.* at

the crisis in the insurance and tort compensation systems, and reform of product liability law has gained increasing acceptance as a means of controlling litigation costs and limiting the size of damage awards.[8]

The private remedy upheld by the decision of the court below will exacerbate the crisis in product liability law and undercut efforts to reform the tort compensation system. Despite widespread recognition of the need to limit the potential liability of manufacturers and sellers, the decision below would significantly expand the range of legal theories on which liability can be based by permitting damage awards for nonreporting or late reporting under Section 15(b) of the CPSA. Moreover, such reporting violations could be alleged whenever the defendant manufactures or sells a consumer product which is claimed to be defective but was not the subject of a timely report under Section 15(b). Since a wide range of products can be classified as "consumer products" under the Act,[9] and since the CPSC's regulations interpreting Section 15(b) are broadly framed, claims under Section 23 could be included in virtually any product liability suit.

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11. Manufacturers of household appliances have found the availability of insurance curtailed significantly in recent years, and the Association of Home Appliance Manufacturers recently lost the group coverage it obtained in 1983. *Id.* at 10.

[8] These proposals are reflected in the recent report of the presidential task force on insurance availability and the large number of pending legislative proposals to establish a national product liability law. Several members of Congress have proposed legislation to help remedy the proliferation in product litigation. *See, e.g.*, S. 2046, 99th Cong., 2d Sess. (1986) (Litigation Abuse Reform Act of 1986 introduced by Sen. McConnell); H.R. 4504, 99th Cong., 2d Sess. (1986) (Federal Product Liability Act introduced by Rep. LaFalce); H.R. 4425, 99th Cong., 2d Sess. (1986) (Product Liability Uniform Standards Act introduced by Rep. Roth); S. 1999, 99th Cong., 2d Sess. (1985) (Product Liability Voluntary Claims and Uniform Standards Act introduced by Sen. Danforth).

[9] 15 U.S.C. § 2052(a).

Substantial incentives exist for product liability plaintiffs to augment their common law claims with allegations of reporting violations under the CPSA. Under the doctrine of pendent jurisdiction, plaintiffs asserting Section 23 claims would be entitled to litigate in federal court not just issues arising under the CPSA but common law tort claims that normally could be heard only in state courts.[10] Moreover, Section 23 of the CPSA specifically authorizes the recovery of attorneys' and expert witness fees as well as litigation costs—a potential windfall which is not available in conventional tort suits, where fees and costs typically are deducted from any damage award on the basis of negotiated "contingency" arrangements.

These inducements for invoking Section 23 have not escaped notice by the plaintiffs' bar.[11] Since the first reported decision upholding a nonreporting claim in 1981, the number of cases under Section 23 has steadily mounted, and scores of Section 23 suits have been filed against the amici's members.

In addition to expanding the potential liability of manufacturers and sellers, the assertion of Section 23 claims would complicate greatly the trial of product liability cases. Since the cause of action recognized by the lower court is predicated on an alleged violation of the CPSC

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[10] Of the eight reported decisions construing the scope of Section 23, only *Swenson* was issued by a state court; the remainder were decisions of federal district courts.

[11] An article in the monthly publication of the American Trial Lawyers Association, for example, urged plaintiffs' attorneys in product liability actions to include a count in their complaints (or amend existing complaints to add a count) alleging a private cause of action under the Act. *See, e.g.*, Babij, *Industry Fails to Report Product Hazards*, TRIAL, Oct. 1984, at 62. Similar articles have appeared in other publications. *See, e.g.*, Epstein, *Failure to Warn*, TRIAL, April 1986, at 67; Karon, *Application of the CPSA and Proof of Failure to Warn in Product Liability Actions*, MINN. TRIAL LAW., Jan.-Feb. 1985, at 8; Gilbert, *Target Product Update*, Leader's Product Liability Newsletter, April 1986, at 5.

regulations interpreting Section 15(b), the focus of a Section 23 case necessarily would be on the defendant's compliance with the detailed procedures, interpretations, and recommendations adopted by the Commission to provide guidance to industry.[12] As a result, judges with no regulatory experience would be responsible for explaining a complex administrative scheme to lay juries, who then would have to use that scheme to evaluate the conduct of defendant manufacturers.[13]

Complicating the task of judges and juries would be the two-stage inquiry necessary to determine whether liability should be imposed under Section 23. Even if the evidence shows that the defendant violated the Section 15(b) reporting duty, it must be demonstrated that the plaintiff's damages were *caused* by this failure to report. Establishing this causal connection will require evidence that, if a timely report had been filed, the Commission would have ordered remedial measures that would have removed the defendant's product from the stream of commerce, alerted users to possible risks, or otherwise prevented the plaintiff's injury.

The Commission can require repair, replacement or public notice concerning defective products only if it makes the findings specified in Sections 15(c) and (d) of the CPSA after conducting an adjudicative hearing

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[12] For example, the regulations provide illustrations of the kinds of information that firms should evaluate in determining whether they have a duty to report (16 C.F.R. § 1115.12(e)); examples of products that the Commission considers "defective" (16 C.F.R. § 1115.4); and criteria the Commission may use to determine whether a defect presents a substantial product hazard (16 C.F.R. § 1115.12(f)).

[13] In some cases, plaintiffs have sought to introduce the testimony of ex-CPSC employees with "expertise" in applying the Commission's Section 15(b) regulations, but some courts have held such testimony inadmissible on the ground that it usurps the role of the judge and jury. *See Payne* v. *A.O. Smith Corp.*, 627 F. Supp. 226, 228 (S.D. Ohio 1985).

and evaluating the whole record.[14] Thus, judges and juries in a Section 23 case would have to interpret and apply not just the CPSC regulations construing Section 15(b), but the statutory and administrative provisions governing remedial action as well. Here too, judges and juries would be required to determine complex questions of fact and law that Congress committed to an expert administrative agency. Moreover, predicting the Commission's probable course of action in response to a Section 15(b) report would require multiple speculations about a variety of difficult issues that judges and juries are ill-equipped to address.[15]

The complex factual issues raised by Section 23 claims would necessarily broaden the scope of evidence that is discoverable and perhaps admissible in product liability actions. In order to prove that the defendant was in possession of information that was reportable under Section 15, the plaintiff may insist on pursuing broad-ranging discovery concerning all phases of the design and safety history of the defendant's product as well as the defendant's decision-making process on safety issues. Much of this evidence might be inadmissible in a normal product liability case because it does not involve occur-

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[14] The submission of a report under Section 15(b) would not, in and of itself, result in remedial action. The statute and the regulations encourage companies to report safety problems that "may" present a substantial product hazard, even if in fact, after a full evaluation, no substantial product hazard would be found by the Commission. *See* 43 Fed. Reg. 34,999. Before the Commission can require corrective action under Section 15(c) or (d), substantial evidence must be presented that a product in fact contains a "defect" which "creates a substantial risk of injury to the public." 15 U.S.C. § 2064(a)(2).

[15] Even in the best of circumstances, the prediction of Commission behavior is subject to a large margin of error. It depends on variables such as overall Commission priorities, the predilections of individual commissioners, and the availability of agency resources.

rences similar to the accident at issue.[16] Moreover, where a report was filed with the CPSC but the plaintiff alleges it was untimely, communications between the defendant and the Commission and internal CPSC documents also would be an obvious target for discovery. These increased discovery burdens would add to the time, effort and expense necessary to resolve product liability claims.

For these reasons, the private cause of action recognized by the court below has disturbing implications for the trial of product liability cases which merit the attention of this Court. Granting the petition for a writ of certiorari would enable the Court to examine the legal basis for a new remedy that threatens to impose additional liabilities and litigation costs on a tort compensation system that is already seriously overburdened and in urgent need of reform.

III. THIS CASE OFFERS THE COURT A RARE OPPORTUNITY TO CONSIDER THE EXISTENCE OF A PRIVATE RIGHT OF ACTION FOR VIOLATION OF CPSC INTERPRETIVE GUIDELINES.

As a result of the interlocutory appeal permitted by the Minnesota courts, this case provides a rare occasion to determine whether private litigants have a right to sue for violation of the reporting requirements interpreted by the CPSC regulations. Although Section 23

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[16] In ordinary product liability cases, courts are extremely careful to guard against the danger of "diverting the jury's attention from the instant occurrence and confusing the issues." *Johnson* v. *Amerco, Inc.*, 877 Ill. App. 3d 827, 42 Ill. Dec. 684, 409 N.E.2d 299, 315 (1980). *See also Uitts* v. *General Motors Corp.*, 411 F. Supp. 1380, 1383 (E.D. Pa. 1974) (plaintiff precluded from offering reports of 35 other accidents because of potential for "unfair prejudice, consumption of time and distraction of the jury to collateral matters"). Courts also carefully circumscribe plaintiffs' attempts to rely on evidence of warranty returns and other field performance complaints absent proof that the complaints regarding the other products are similar. *See Eickelberg* v. *Deere & Co.*, 276 N.W.2d 442, 445 (Iowa 1979).

claims have been asserted in numerous product liability cases, the opportunities for appellate review have been limited because most of the cases have been settled before trial or tried but not appealed. Thus, if the Court declines to grant review now, there may be no additional opportunity to consider the issue in the near future.

In view of the split in authority in the lower courts, further development of the case law is not likely to clarify the private remedy provisions of the CPSA, and the absence of guidance from this Court will increase the confusion and uncertainty among lower courts and litigants. Because the scope of Section 23 has far-reaching consequences for product liability litigation, the Court should take the opportunity that this case offers to render a definitive ruling on this important issue of federal law.

CONCLUSION

For the foregoing reasons, the amici urge that the petition for writ of certiorari be granted.

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REPLY BRIEF FOR THE PETITIONER

The decision of the Minnesota Supreme Court in this case recognizes a new federal tort claim based on failure to comply with interpretive guidelines that the Consumer Product Safety Commission (CPSC) expressly determined would have no binding effect. Respondent contends that, under the Court's decisions, the interpretive guidelines are binding regardless of the CPSC's express declaration to the contrary. She also argues that private damage suits are needed to enforce statutory reporting requirements because "due to monetary restraints the Commission cannot fully perform its job and needs the help of private litigants." And she maintains that the prospect of this new liability will induce such widespread settlement of product liability claims that it will "clear many federal and state court calendars." In all these respects, respondent's Brief In Opposition confirms that the decision below presents an important question of federal law with major consequences for both the judicial system and product liability law generally.

I. THE STATE COURT DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS AND NULLIFIES THE CPSC'S EXPRESS DETERMINATION THAT ITS REPORTING GUIDELINES ARE NOT BINDING

As shown in the Petition, private damage suits under Section 23 of the Consumer Product Safety Act (CPSA) are authorized only for "violations" of a CPSC rule or order (Pet. 2-3). There can be no violation of a rule or order unless it has binding effect. An interpretive guideline that has no binding effect may perhaps qualify as a "rule" but it certainly cannot be violated, and thus cannot give rise to a private cause of action under Section 23 of the Act. The statutory provision that an interpretive guideline construes can of course be violated, but, as the court below recognized, such violations cannot provide the basis for a private damage suit because Congress did not create a private remedy for noncompliance with statutory requirements.

Respondent makes no claim that a Section 23 action could be based on a rule or order that has no binding effect. Nor does she argue that violations of the statutory reporting requirements are themselves actionable under Section 23. Instead, respondent argues that the CPSC's interpretive reporting guidelines are binding because "even if the reporting requirements are considered interpretive, they have the force and effect of law if they reasonably interpret the statute." (Br. in Opp. 7) That attempted defense of the decision below is untenable in two fundamental respects, each of which emphasizes the significance of the federal question presented for review.

First, the claim that the reporting guidelines are binding would, if accepted, nullify the CPSC's express determination that they have no independent legal effect. In promulgating these guidelines, the Commission specifically designated them as "interpretive" and stated that they would not "have the force and effect of law." 43 Fed. Reg. 34,988, 34,990 (1978) (Pet. App. 2f-3f). The agency made clear that an enforcement action could not be based on noncompliance with the guidelines themselves, but only upon violation of Section 15(b) of the Act, which the guidelines seek to interpret.

Respondent's position is that the Commission's express designation of these guidelines as nonbinding should be ignored. The principal basis cited for this extraordinary conclusion is that, before adopting the guidelines, the CPSC provided notice and an opportunity for comment. "If the Commission wished to adopt unenforceable rules only," says respondent, "it need not have published this notice nor requested comment." (Br. in Opp. 9) That is simply not the law. It is well-established that "an agency may, if it wishes, employ notice and comment procedures when proposing interpretive rules without thereby converting them into legislative rules." [1]

Respondent's attempt to disregard the CPSC's determination is not aided by her contention that the CPSA authorizes the promulgation of substantive rules implementing Section 15(b) (Br. in Opp. 9). In fact, the provision that respondent cites—Section 27(e)—provides no basis for regulations implementing Section 15(b) and was not invoked by the Commission for this purpose.[2] But even assuming that the CPSC had authority to adopt substantive rules, it deliberately decided not to do so here. It is well-established that an agency's characterization of its own rules as interpretive should normally be controlling, whether or not the rules could have been promulgated as substantive regulations.[3]

Respondent's claim that the CPSC's determination of the status of its own rules is ineffective and can be disregarded in a private liability suit presents a federal question of considerable significance. If accepted, this contention would leave federal

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[1] Note, *Private Causes of Action Under the Reporting Rules of the Consumer Product Safety Act*, 17 MINN. L. REV. 955, 968 (1986).

[2] Section 27(e) applies only to manufacturers while Section 15(b) applies to manufacturers, distributors and retailers. Moreover, Section 27(e) calls for the submission of "performance and technical data related to performance and safety," which is a narrower category of information than that called for by Section 15(b). Contrary to respondent's suggestion, the Commission did not invoke Section 27(e) when promulgating 16 C.F.R. Part 1115 and Section 15(b) itself grants the Commission no power to promulgate substantive rules.

[3] K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 5.03, at 148-49 (1976); 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7:16, at 76-78 (1979). *See also* Pet. at 8 n.4.

agencies powerless to adopt nonbinding rules except by foregoing the opportunity for public comment. A state court decision that overrides a federal agency's express decision to adopt nonbinding rules has disturbing implications that merit close review by this Court.

Second, respondent's insistence that interpretive rules can be considered binding if they reasonably interpret the statute is based on a fundamental misreading of this Court's decisions. Respondent confuses the question whether interpretive rules have independent binding effect with the quite different question whether they will be upheld as valid interpretations of the statute. The cases respondent cites go to the latter question, not to the former. For example, the Court's decision in *Whirlpool Corp.* v. *Marshall,* 445 U.S. 1, 11 (1980), recognizes that an agency's interpretation of the statute it administers is entitled to "deference" from courts charged with determining what the statute means. But neither *Whirlpool* nor any other decision of this Court departs from the fundamental principle that only the statute, not the interpretive rule, carries the force of law. Thus, a holding that an interpretive rule is valid merely means that the agency has correctly interpreted the statute;[4] it does not mean that the rule should receive force and effect apart from the statute it construes.[5]

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[4] For this reason, the CPSC guidelines at issue here would lack independent force and effect even if, as the court below held and respondent asserts, they correctly interpret Section 15(b). In fact, however, the validity of the CPSC regulations is open to serious debate. The validity of the regulations was neither briefed nor argued by the parties below. The regulations are elaborate and detailed, and raise complex issues of statutory construction that the court below did not consider. For example, the term "defect" is not defined in the statute itself, and the Commission's definition arguably departs from well-recognized concepts of "defectiveness" embodied in product liability law. Similarly, the statute does not define the information that firms must report or require the submission of reports in two stages. Yet the Commission's regulations specify the contents of reports in great detail and require the submission of both an initial and follow-up report.

[5] The distinction is unimportant in many cases, but it is of critical importance here, because respondent concedes that the statutory reporting requirements do not give rise to a cause of action; accordingly, there is no private remedy unless the CPSC interpretive rule independently creates one.

This distinction is clearly apparent in respondent's quotation from *Skidmore* v. *Swift & Co.*, which notes that interpretive rules are not "controlling on the courts by reason of their authority" and concludes that such rules have the "power to persuade, if *lacking power to control.*" 323 U.S. 134, 140 (1944) (quoted in Br. in Opp. 7). Similarly, in *Morton v. Ruiz,* the Court contrasted substantive and interpretive rules, emphasizing that only the former can "affect[ ] individual rights and obligations" and therefore are "binding" and have the "force of law." 415 U.S. 199, 232, 235-36 (1974). *See also Chrysler Corp.* v. *Brown,* 441 U.S. 281, 301-02 (1979).

These authorities contradict respondent's claim—and the court's holding below—that interpretive rules can have independent legal effect apart from the statutory provisions they construe. Review by this Court is needed to reaffirm the longstanding distinction between interpretive and substantive rules embodied in the Court's decisions as well as to protect the authority of federal agencies to issue nonbinding rules when they choose to do so.

II. RESPONDENT'S BRIEF CONFIRMS THAT THE DECISION BELOW HAS SIGNIFICANT IMPLICATIONS FOR THE JUDICIAL SYSTEM

Respondent's brief also dramatizes the serious consequences that flow from the Minnesota court's misreading of the CPSA and of this Court's decisions. While denying that no flood of new litigation will result,[6] respondent argues in the next breath that the new cause of action will permit private litigants to do the job of protecting the public that the CPSC allegedly is unable to do, thereby summoning an army of new private attorneys general to enforce CPSC guidelines that the Commission determined were unenforceable.

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[6] In fact, the number of Section 23 cases pending in federal courts is already significant. Based on our informal discussions with manufacturers of gas valves and furnaces, we are aware of over twenty Section 23 cases involving this limited class of products. Many additional cases have been filed involving other types of products. Moreover, Section 23 cases surely will proliferate in the future as evidenced by the number of articles encouraging plaintiff's lawyers to file Section 15(b) suits. *See* Brief of Amici Curiae at 9 n.11 (listing articles promoting the filing of Section 15(b) claims).

Moreover, respondent makes abundantly clear just how significant this new claim really is: "It is believed that this cause of action will assist in the settlement of cases and clear many federal and state court calendars." (Br. in Opp. 12) Where it is difficult to prove that a product was defective, respondent has no doubt that a jury can more readily be persuaded of violations of the CPSC reporting guidelines. And respondent expects the portrayal of such alleged violations as "INTENTIONAL" (*id.* 13) both to influence the jury's view on the merits of product liability claims and to extract more settlements by the threat of punitive damages. These are the very effects predicted by the Petition, and respondent's confirmation of our concerns shows how greatly the cause of actions established by the decision below will exacerbate the crisis in product liability law and the insurance system.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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